

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Consolidated Application of)
)
)
ECHOSTAR COMMUNICATIONS CORPORATION,)
GENERAL MOTORS CORPORATION,)
HUGHES ELECTRONICS CORPORATION,)
)
Transferors,) CS DOCKET NO. 01-348
and)
)
ECHOSTAR COMMUNICATIONS CORPORATION,)
)
Transferee,)
)
For Authority to Transfer Control.)

TO: The Commission

PETITION TO DENY OF NATIONAL ASSOCIATION OF BROADCASTERS

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SUMMARY

EchoStar and DIRECTV have proposed a merger that would give EchoStar control of all full-CONUS United States Direct Broadcast Satellite (“DBS”) locations. This merger will result in a consumer welfare loss of approximately \$3 billion or more over the next five years, cannot be justified under prevailing antitrust doctrine, and is completely contrary to the public interest.

The parties propose this merger despite the fact that both companies have been enormously successful on their own. Starting at zero in 1994, DBS is a \$10 billion industry today with over 17 million subscribers. At the same time, EchoStar and DIRECTV have, over time, obtained control of all 96 available frequencies at the only three DBS orbital locations capable of transmitting to the entire lower 48 states. This growth has been marked by intense head-to-head rivalry between EchoStar and DIRECTV in terms of prices for equipment, installation and programming; program offerings; technological innovations; and, most recently, carriage of local broadcast stations pursuant to the Satellite Home Viewer Improvement Act (“SHVIA”). Broadcasters and consumers alike have benefited as each of these two fierce rivals has sought to one-up the other, including competing to add local-to-local service in new markets.

The merger would create a monopoly “gatekeeper” in large numbers of local markets across the United States that do not have cable service or that have limited analog cable systems not competitive with DBS. If there is a DBS submarket of the overall Multichannel Video Programming Distribution (“MVPD”) market, as EchoStar steadfastly maintained until it announced this acquisition, it is a merger to monopoly in the entire United States. If the market is MVPD, the merger will still result in a monopoly in smaller markets and a gatekeeper duopoly between EchoStar and the cable incumbent in nearly all remaining local markets.

The lessening or total elimination of competition in these highly concentrated markets throughout the United States will have profoundly anticompetitive effects on both local broadcasters and consumers. Broadcasters, as the primary source of local programming, will lose the benefit of the relentless rivalry between EchoStar and DIRECTV, rivalry that has already led to the announcement of local-to-local carriage in 51 Designated Marketing Areas (“DMAs”). Broadcasters will also see a reduction of MVPD gatekeepers for local programming from either 2-to-1, or 3-to-2. Consumers where this is a 2-to-1 merger will be at the mercy of a monopoly; and where it is a 3-to-2 merger, consumers will be subject to duopolistic behavior. The new EchoStar will have the ability and incentive to raise prices and lower the quality and quantity of available programming on its own and, in duopoly markets, through coordinated behavior with cable incumbents. Because 2-to-1 and 3-to-2 mergers have such a strong likelihood of anticompetitive effects, they are virtually always condemned by antitrust authorities.

The national uniform pricing plan proposed as a “fix” to the admitted creation of a monopoly in rural areas would not work and would be a giant step back from the sensible commitment to competition rather than regulation as the engine of progress. And the merger would harm competition not just in the DBS and MVPD markets but also in the market for broadband services. The effects will be greatest in areas of the country that are dependent on DBS for high-speed Internet access because they do not have any other broadband or service available. Consumers in those areas will be at the mercy of a monopolist for broadband Internet access.

The parties argue that the anticompetitive impact of the merger should be ignored because the merged firm will be able to serve 100 local markets with local-to-local. But critically, EchoStar and DIRECTV do not claim that service to 100 markets is a benefit *of the merger*, because they

painstakingly avoid disclosing how many markets they would serve individually *without* the merger, using their own planned spot-beam satellites. And in any event, the applicants propose to provide *no* local-to-local service at all in the majority of American television markets (DMAs 101-210).

The NAB believes that just as competition has driven the expansion of local-to-local up to now, it will continue to do so in the future, and that rivalry between two DBS companies will lead to more carriage of local stations than will an EchoStar monopoly. Notably, there is no capacity constraint on the ability of the two firms to serve all 210 markets individually: as the applicants' own Engineering Statement shows, each firm easily could transmit all local stations in the United States, using engineering techniques that DIRECTV, EchoStar, or both have already successfully deployed. And if the two parties wished to avoid all duplication (even though they have ample capacity individually), they could achieve that goal in a much less anti-competitive fashion, through a joint venture - as they discussed prior to deciding to merge. Thus, the proffered efficiency is non-existent and is no counterweight to the anticompetitive effect of the transaction.

Awarding all full-CONUS spectrum to a single company would be contrary to established Commission policy, would eliminate competition, and would harm the public interest. For all of the above reasons, EchoStar and DIRECTV's transfer of control application should be summarily denied by the Commission.

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PETITION TO DENY OF NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (“NAB”) respectfully submits this Petition to Deny the Consolidated Application for Authority to Transfer Control Filed by General Motors Corporation, Hughes Electronics Corporation and EchoStar Communications Corporation. For the reasons set forth below, grant of the application would be contrary to the public interest, and the application should therefore be denied.

I. INTRODUCTION

A. The Transaction

EchoStar Communications Corporation (“EchoStar”) and Hughes Electronics Corporation, a subsidiary of General Motors, Inc., have announced an agreement by which General Motors will spin off Hughes, including its Direct Broadcast Satellite (“DBS”) business, DIRECTV, which will then merge with EchoStar. The parties to this transaction have filed a Consolidated Application For Authority to Transfer Control, seeking authority to transfer control of satellite, earth station, and other authorizations, including licenses to use orbital satellite positions for DBS services, into the new company.¹

B. NAB’s Members’ Role As Broadcasters And Interest In Proceeding

The NAB is a non-profit trade association that promotes and protects the interests of radio and television broadcasters in Washington and around the world. The NAB is the broadcaster’s voice before the Commission, Congress, and the courts. The NAB is committed to the goal of promoting localism and diversity in television programming throughout the United States.

The broadcasting industry has historically provided free, over the air programming. As cable emerged, grew and thrived through the 70s, 80s and 90s as a Multichannel Video Programming Distributor (“MVPD”), it evolved as the “gatekeeper” of programming, particularly local programming, throughout the United States. With the 1999 passage of the Satellite Home Viewer Improvement Act (“SHVIA”), satellite carriers were also granted this gatekeeper role, enabling DBS companies to deliver

¹ See generally EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation and EchoStar Communications Corporation, Consolidated Application for Authority to Transfer Control (December 3, 2001) (hereinafter “Consolidated Application”).

TV stations within their own markets without paying copyright royalties to the owners of the programming carried on those stations.

As local programming suppliers, the NAB's members stand to be substantially harmed by the proposed merger of EchoStar and DIRECTV. By combining the only two DBS providers, the merger will create a DBS monopoly, reduce the number of MVPDs, eliminate beneficial rivalry between two DBS firms to offer local-to-local service in new markets, and enable EchoStar and DIRECTV to exercise significant market power in both the purchase and distribution of video programming throughout the country. This reduction in competition will be to the detriment of both program suppliers and viewers.

C. Overview

EchoStar and DIRECTV, the sole remaining DBS companies with full-CONUS spectrum in the United States, propose to merge. Their merger would create a monopoly in large areas of the United States and for many millions of MVPD and broadband Internet customers. In most other areas, at best the merger would reduce the number of competitors to two, creating a duopoly and ending EchoStar's frequent role as a maverick in the DBS and MVPD industries. The net present value of the total consumer welfare loss over the next five years is estimated to be approximately \$3 billion or more.

The anticompetitive effects of this reduction of competition would be felt both by consumers and programming suppliers, including the local broadcast stations that are members of NAB. Broadcasters would be particularly harmed because they would lose the benefit of the DBS rivalry that has led to carriage of local broadcast stations in many markets on one or both DBS systems. The merger would

also have a deleterious effect on broadcasters' ability to obtain fair compensation for retransmission consent.

The merger application is particularly audacious because both companies have been enormously successful on their own. Today DBS is a \$10 billion industry; it has grown from zero subscribers in 1994 to over 17 million at the end of 2001. More than two out of every three new MVPD subscribers choose DBS over cable. This phenomenal growth has accelerated markedly since the passage of SHVIA in late 1999, which allowed DBS providers to offer local broadcast signals. Since SHVIA's passage, EchoStar's and DIRECTV's subscriber numbers have grown 87.6 percent and 60.2 percent respectively.

At the same time as the DBS industry has enjoyed such striking success, it has concentrated into a two-firm duopoly, down from five licensees with full-CONUS spectrum in 1998. Today, EchoStar and DIRECTV control all 96 available frequencies at the three orbital locations capable of transmitting to the entire lower 48 states, 101° WL, 110° WL, and 119° WL. Because these are the only three full-CONUS orbital slots available to the United States in the high-power Ku-band, the barriers to entry into the DBS industry are not merely high, they are insurmountable. And because DBS has been the only successful competitive entrant against cable, this means that barriers to entry to an overall MVPD market are also extremely high.

The astounding growth of the DBS industry has been spurred by the direct head-to-head market and innovation rivalry between EchoStar and DIRECTV. Because DIRECTV was first to market in 1994, EchoStar, since its entry in 1996, frequently has played the role of a maverick with lower prices and innovative marketing concepts. Among the areas in which the two have competed fiercely are equipment and installation pricing, where EchoStar led the market downward; programming,

where each service has developed niches, such as DIRECTV's subscription sports packages and EchoStar's wide array of international programming; technology, where the two firms have sought to outdo each other in offering personal video recorders, high definition receivers, and other innovative technologies; and local-to-local, which EchoStar first pioneered but where DIRECTV now offers service in more cities and in a more consumer-friendly manner. All of this rivalry spurring innovation would be lost if EchoStar and DIRECTV were allowed to merge.

Mergers are analyzed in markets which have both a geographic and product component. The anticompetitive effects of this merger would be felt in local geographic markets throughout the United States, including markets that will never see local-to-local service because of the end of rivalry between the only two DBS firms. Local markets are the areas relevant to consumers because what matters to consumers are the competitive choices available to them.

In terms of product markets, because of the increasing competition between digital cable and DBS carriers in some markets, there is an overall MVPD market. EchoStar also insisted, until filing its merger application, that there is a separate DBS submarket because of the many distinctive characteristics differentiating DBS from cable. In fact, EchoStar CEO Charles Ergen even now maintains "that there is a submarket of satellite, particularly in rural [areas]."² There is ample evidence to support Mr. Ergen's view.

In terms of competitive effects, the proposed merger will have ill effects whether EchoStar's position is correct that there is a separate DBS market, or whether EchoStar and DIRECTV are closest substitutes for one another in an overall MVPD market. In either case, this is a merger to monopoly for

² *Ergen Makes His Case*, SATELLITE BUS. NEWS, Dec. 31, 2001, at 11 (hereinafter "*Ergen*").

millions of households throughout the United States who are not passed by cable systems, and at best a merger to duopoly everywhere else. EchoStar claims that there are only three million households in the former category, but the data it relies on are clearly inaccurate. Perhaps most strikingly, DIRECTV's own internal survey data show that there are more than three million households not passed by cable *just among DIRECTV's own 10.7 million subscribers*.³ As to the national figures, the NRTC has suggested that the percentage of homes passed by cable may actually be only around 81 percent, based on a joint report by agencies of the Departments of Commerce and Agriculture. Whatever the exact number, it is clear that in many areas large numbers of consumers have no access to cable. For instance, Pegasus reports that in 22 states over 30 percent of housing units have no cable access.⁴ For all of these consumers, this merger eliminates their only realistic competitive choice.

The situation is much the same for consumers who live in rural areas passed by financially marginal cable systems. A detailed study by a leading investment banking firm found that 8,270 cable systems, serving roughly 8.2 million predominantly rural subscribers, may become extinct within the next five to eight years because they cannot justify the investment to upgrade to digital.⁵ Consumers in these territories will also face a monopoly DBS supplier if the merger is approved.

³ In a filing with the Commission just a few months ago, DIRECTV said that its own internal customer surveys showed that 29 percent of its subscribers are unable to subscribe to cable. *See* Comments of DIRECTV, Inc., In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 01-129, at 13 (filed Aug. 3, 2001) (only "71% of DIRECTV customers live in areas able to receive television service.").

⁴ Pegasus Communications *ex parte* notice, CS Docket No. 01-348 (Jan. 23, 2002).

⁵ Credit Suisse First Boston Equity Research, *Natural Selection: DBS Should Thrive as the Fittest to Serve Rural America*, at 3 (Oct. 12, 2001).

In nearly all other areas of the country this will be, at best, a 3-to-2 merger. As such, and particularly because it will eliminate EchoStar's closest competitor, it is likely that EchoStar will have the incentive and ability to unilaterally raise its prices, without regard to what the cable company may do. Also, with an MVPD duopoly established, it will be much more likely that EchoStar and the cable incumbents will be able to coordinate their pricing behavior.

Broadcasters, as local program suppliers, will suffer from this elimination of competition. The competitive rivalry between these two companies has spurred technological innovation that has expanded the capacity to provide local-to-local service on a cost-efficient basis. A monopoly EchoStar will have much less incentive to innovate and add local stations. While EchoStar and DIRECTV "promise" to add stations up through DMA 100 over some undetermined period of time if the merger is approved, it would still leave markets 101-210, in which 14 percent of the country's population resides, with no hope of receiving local-to-local service. Given the track record of the competition between these companies, the advancements in satellite technology, and the considerable disparity between EchoStar's promises and its performance when left to its own devices, the NAB believes that such markets are much more likely to be carried as a result of competition than if they are at the mercy of an EchoStar monopoly. In addition, local broadcasters will be harmed by the reduction in the number of gatekeepers – cable and DBS – for local station programming.

Because of the strong likelihood that a 2-to-1 or 3-to-2 merger creating highly concentrated markets will result in higher consumer prices and reduced output, such mergers are universally condemned. Such mergers fail to win approval even when (unlike here) they may offer large efficiency gains. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001). Here, the parties claim efficiencies would result through the elimination of duplicate carriage, principally of local broadcast

stations. However, the claimed efficiencies fall far short of the “extraordinary efficiencies” required for a merger in a concentrated industry, for the following reasons.

First, the main claim is that with the merger, local-to-local service will be offered in approximately 100 markets. But there is much less here than meets the eye – in fact, nothing at all. The top 51 markets are already provided for: local-to-local was available in 41 markets when the two firms filed their application in December, and only a few weeks later DIRECTV announced plans to add 10 more markets this year. Critically, EchoStar and DIRECTV do not claim that they *need* the merger to serve 100 markets. Their application carefully avoids disclosing how many markets each company, pre-merger, would serve individually with the spot-beam satellites they have already ordered (but not yet launched). Since the two firms together already plan to serve 51 markets with their existing satellites, and since each firm separately plans to launch either one (DIRECTV) or two (EchoStar) additional satellites *designed to provide local-to-local*, the number of markets the two firms will serve separately is plainly higher than 51, and may be higher than 100.

Second, to be cognizable, an efficiency must be merger-specific, i.e., achievable only through the merger. In this case, to the contrary, as the Declaration of Richard Gould shows, based on DIRECTV’s and EchoStar’s own Engineering Statement each party individually easily could offer all local stations in all 210 DMAs.⁶ In fact, the parties do not deny that absent the merger they plan to offer local stations in additional DMAs beyond the top 51 (and perhaps beyond 100). And in any event, the parties could eliminate duplication by entering into a joint venture agreement regarding as much programming as they find efficient – without the anticompetitive consequences of the merger.

⁶ Declaration of Richard G. Gould ¶ 3(c) (“Gould Decl.”) (App. C).

Finally, recognizing that the merger would adversely impact consumers in non-cabled areas (but ignoring the anticompetitive impact elsewhere), EchoStar has proposed to offer a uniform national price, presumably to be enforced by the Commission and/or Department of Justice. Such a national pricing plan would be a giant step backward from the goals of the Telecommunications Act of 1996 to promote competition and eliminate regulation. Further, it simply would not work because there are many more dimensions to competition than a simple national monthly fee: prices for equipment and installation, customer service levels, investments in new local-to-local markets, and the like. And even as to price, Mr. Ergen himself admits that EchoStar would respond to specialized local pricing by cable operators.⁷

For these reasons, a national programming price fix will not work. But if it did work, it would harm, not benefit, competition. The uniform national price would be a duopoly price, not a competitive price, and would exacerbate the oligopolistic nature of the market.

In addition to the merger's adverse effects in video markets, it will have a similar anticompetitive effect in the satellite broadband market. Many millions of consumers who are not passed by an upgraded (or any) cable system, and who live too far from telephone company central offices to have Digital Subscriber Line ("DSL") service available, are totally dependent on DBS for high-speed Internet access. Both EchoStar and DIRECTV offer such service today. The merger would eliminate this competition, and without any serious claim of an efficiency benefit: since each customer needs his or her own dedicated broadband transmissions, there is no serious "avoidance of duplication" argument in the first place.

⁷ *Ergen Makes His Case*, SATELLITE BUS. NEWS, Dec. 31, 2001 at 11 ("Ergen").

Because of its strongly adverse effect on competition in large numbers of video and broadband Internet markets throughout the country, the Commission should decline to authorize the transfers of control sought here.

II. DBS: A STORY OF SUCCESS THROUGH COMPETITION

A. EchoStar And DIRECTV Control All DBS Full-CONUS Spectrum

EchoStar and DIRECTV are the only two competitors⁸ that supply high-power DBS service in the United States.⁹ DIRECTV was the first provider of such DBS services in the United States, entering in 1994, followed by EchoStar in 1996. Through head-to-head competition with one another for subscribers, the two firms (along with other firms with which either DIRECTV or EchoStar has merged over the past six years) have taken the DBS industry from zero subscribers in 1994 to more than 17 million subscribers today.¹⁰

⁸ Dominion Video Satellite is the licensee of 8 frequencies at 61.5°, a partial-CONUS, high-power Ku slot. Dominion, a regional niche religious service offering only 19 video channels, is in no way a competitor to DIRECTV and EchoStar. Dominion has not launched its own satellite, choosing to lease capacity on EchoStar's satellite located at 61.5°. See <<http://www.skyangel.com>>.

⁹ DBS refers to satellite transmissions in the BSS (Broadcast Satellite Service) band at high power Ku-band frequencies (12.2 GHz-12.7GHz). C-band and medium power systems involving transmissions in the FSS (Fixed Satellite Service) band are excluded unless specifically noted. At the end of December 2001, C-band had fewer than 900,000 subscribers. See <www.skyreport.com>. No medium power systems operate today, and none are expected.

¹⁰ See DIRECTV Press Release, *DIRECTV Announces Fourth Quarter and Year-End 2001 Subscriber Growth; Strong Performance Exceeds Expectations; DIRECTV Ends Year with 10.7 Million Customers* (Jan. 8, 2002) (“Jan. 8, 2002 DIRECTV press release”). See also EchoStar Press Release, *EchoStar Reports Over \$1 Billion of Revenue, Record EBITDA and Net Income in Third Quarter* (Oct. 23, 2001) (“Oct. 23, 2001 EchoStar press release”).

The merger applicants are, and will be, the only United States licensees of high-power full-CONUS Ku-band spectrum.¹¹ The International Telecommunication Union, a United Nations agency that allocates satellite frequencies and slots on a global basis, assigned the U.S. eight high-power DBS orbital locations, comprised of three full-CONUS and five partial-CONUS slots. The full-CONUS slots are at 101° West Longitude (WL), 110° WL, and 119° WL.¹² The 500-megahertz (MHz) of spectrum available at each DBS orbital location is divided into 32 frequencies.¹³

In the late 1980's and early 1990's, the FCC licensed the DBS frequencies. By 1997, five DBS licensees controlled the full-CONUS spectrum, although only DIRECTV, EchoStar and United States Satellite Broadcasting (USSB) had actually launched high-power offerings.¹⁴ During 1999, ASkyB was merged into EchoStar, and DIRECTV acquired USSB and PrimeStar. At the beginning of 2000, only DIRECTV and EchoStar remained. The following charts depict frequency allocations before and after consolidation:

¹¹ See, e.g., Kagan World Media, *The State of DBS 2002*, 4 (“Kagan 2002”) (November 2001). CONUS is an acronym for contiguous United States. With full-CONUS slots, DIRECTV and EchoStar can reach the entire U.S., except Alaska and Hawaii, from one location without having to duplicate programming on multiple satellites in multiple orbital locations, minimizing the capital costs associated with launching a system while maximizing the potential market.

¹² Partial CONUS slots are located at 61.5°, 148°, 157°, 166°, and 175°.

¹³ Frequencies are assigned to companies. More than one company may be assigned frequencies at any location, and more than one satellite can occupy a slot as long as the satellites do not create frequency interference or collision issues.

¹⁴ Kagan 2002 at 75. Of the other two licensees, American Sky Broadcasting (ASkyB), was a joint venture of MCI and News Corp., while Tempo Satellite was a subsidiary of TCI Satellite Entertainment and was later rolled into PrimeStar.

**Full-CONUS High-power
Ku-band Frequency Allocation
Prior to 1998-1999 Consolidation¹⁵**

Licensee	101° WL	110° WL	119° WL	Total
EchoStar	0	1	21	22
DIRECTV	27	0	0	27
AskyB/MCI	0	28	0	28
Tempo (TCI)	0	0	11	11
USSB	5	3	0	8
Total	32	32	32	96

Source: FCC Filings and Company Reports

**Full CONUS High-power
Ku-band Frequency Allocation
After 1998-1999 Consolidation¹⁶**

Licensee	101° WL	110° WL	119° WL	Total
EchoStar	0	29	21	50
DIRECTV	32	3	11	46
Total	32	32	32	96

*Source: DIRECTV and EchoStar
Securities & Exchange Commission Filings*

The unavailability of additional full-CONUS spectrum creates not merely a high barrier to entry for any DBS competitor, but an insurmountable one. No other DBS firm will share in the two competitors' tremendous success.

¹⁵ *Id.*

¹⁶ *Id.* at 76.

B. Competition Between The Two Firms Has Stimulated The Growth Of Local-To-Local

After DIRECTV launched in June 1994, DBS primarily attracted subscribers from rural America, where cable is unavailable or limited. DIRECTV also attracted enthusiasts of satellite's digital picture and sound, subscription sports packages, such as DIRECTV's exclusive NFL Sunday Ticket™ package, and premium movie channels. DIRECTV had 350,000 subscribers by the end of 1994 and grew quickly, reaching 2 million subscribers in 1996, and 4 million by 1998.¹⁷ In March 1996, EchoStar entered with a "low cost" DBS system with fewer sports and movie offerings, attracting more price-conscious consumers and acquiring 350,000 subscribers in its first year. EchoStar served 1 million subscribers by the end of 1997.¹⁸

With the passage of SHVIA in 1999, DBS became a gatekeeper for local programming in several DMAs.¹⁹ The DBS industry has acknowledged that local-to-local became a catalyst in DBS companies' dramatic growth. For example, the Satellite Broadcasting & Communications Association said that the industry's "40% subscriber addition growth in 2000 is primarily the result of legislation passed in November 1999 allowing the DBS operators to offer local broadcast channels in markets of their choice."²⁰ Since adding local channels, EchoStar's and DIRECTV's subscriber numbers have

¹⁷ See Kagan 2002 at 4; Skyreport, *History of DTH* at <http://www.skyreport.com/dth_his.htm> (viewed Jan. 30, 2001).

¹⁸ See Skyreport, *History of DTH*.

¹⁹ Nielsen Media Research, Inc. publishes an annual list of DMAs based upon population estimates. The U.S. television market is divided into 210 distinct television markets drawn along county lines.

²⁰ SBCA Comments, *In Re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132 (filed July 2000) (quoting industry analyst).

grown 87 and 60 percent, respectively.²¹ With local channels available on DBS, more than two out of three new multichannel video subscribers are choosing DBS over cable. For example, from June 2000 to June 2001, DBS added over 8,219 new subscribers daily compared to cable's 3,562.²² As the following chart reveals, historically cable's annual subscriber growth rate from 1995 through June 2001 averaged less than 2.25 percent, compared to DIRECTV's and EchoStar's annual average subscriber growth rates of 74 and 94 percent, respectively:²³

**DBS vs. Cable Subscriber Growth Rates
1995 – 2001**

	1995	1996	1997	1998	1999	2000	2001	Average
Cable	4.0%	2.3%	2.2%	1.8%	1.8%	1.8%	0.7%	2.25%
DIRECTV	254.0%	85.5%	43.5%	35.0%	49.8%	42.7%	12.2%	74.67%
EchoStar	N/A	N/A	197%	86.5%	75.7%	54.3%	33.4%	94.08%

Overall, DBS has become an increasingly strong competitive force. As DIRECTV President, Roxanne Austin, recently summed up the future of DBS: “With the recent activation of additional local

²¹ See, e.g., Kagan 2002 at 4. See also DIRECTV Press Release, (Jan. 8, 2002) EchoStar Press Release (Oct. 23, 2001).

²² See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-389, CS Docket No. 01-129, Eighth Annual Report at 4 (Jan. 14, 2002).

²³ See *id.*; Kagan 2002 at 4; see also DIRECTV Press Release (Jan. 8, 2002); EchoStar press release (Oct. 23, 2001). Based on available 2001 data, the cable numbers are as of June 2001,

channels in our 41 local channel markets, coupled with new initiatives . . . , we are poised for continued strong growth in the new year.”²⁴

III. ECHOSTAR AND DIRECTV ARE FIERCE HEAD-TO-HEAD COMPETITORS

The major factor propelling DBS’s phenomenal growth since 1994 has been the intense head-to-head competition between DIRECTV and EchoStar. Since its entry, EchoStar has always focused on DIRECTV and often acted as a “maverick.”²⁵ DIRECTV has responded with its own aggressive counter-strategy. This competition has resulted in significant consumer benefits, including: aggressive marketing and pricing; diverse programming packages; expanded local-to-local service; and innovative advanced technologies. The factual record leaves no doubt that EchoStar and DIRECTV are each others’ closest substitutes.

DIRECTV’s numbers are as of December 31, 2001, and EchoStar’s numbers are as of September 30, 2001. Averages are calculated accordingly.

²⁴ DIRECTV Press Release, *DIRECTV Announces Fourth Quarter and Year-End 2001 Subscriber Growth* (Jan. 8, 2002).

²⁵ Mavericks are “firms that have a greater economic incentive to deviate from the terms of coordination than do most of their rivals (e.g., firms that are unusually disruptive and competitive influences in the market).” *Merger Guidelines* § 2.12; see Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 51 (1995) (defining maverick as “firm with low costs, high excess or divertible capacity, superior innovation, an ability to disguise output increases, or other factors that make it a ‘disruptive’ or competitive influence in the market”). As the *Merger Guidelines* indicate, antitrust law – and indeed the public interest – is concerned with elimination of mavericks because “acquisition of a maverick firm is one way in which a merger may make coordinated interaction more likely, more successful, or more complete.” *Merger Guidelines* § 2.12.

A. EchoStar And DIRECTV Compete Intensely On Price

EchoStar and DIRECTV compete vigorously with each other on prices for equipment, programming, and installation. The bitter and direct rivalry between the two firms on pricing is exemplified by the battle cry with which EchoStar initiated the first price war with DIRECTV in June 1996, when EchoStar slashed – by hundreds of dollars – the costs of acquiring a satellite system: “We fully expect that this benchmark price point will force the rest of the DBS industry to re-evaluate their current marketing plans in response to EchoStar’s lead.”²⁶

Indeed, in filings with the Commission, EchoStar has expressly taken credit for cutting DBS prices and forcing DIRECTV (and other DBS firms, back when there were such firms) to do the same. In 1997, for example, EchoStar boasted to the Commission that it had twice “broken new ground among DBS providers” on pricing in the previous year.²⁷ EchoStar regularly advertises itself as the pricing maverick who “made satellite television affordable.”²⁸ Indeed, the public record leaves no doubt that the two firms meticulously track one another’s pricing and promotional offers, and typically either match their competitor’s offer or take other action that reflects the zealous, head-to-head rivalry between the two firms. The public record also demonstrates beyond dispute that each firm understands that the other firm offers consumers by far the closest substitute for its services. Here are a few notable examples:

²⁶ EchoStar Press Release, *Dish Network Introduces \$199 DBS System Nationwide* (July 31, 1996).

²⁷ See Comments of EchoStar Communications Corp., [1997] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 97-141, at 2 (filed July 23, 1997).

- ? **\$199 dish and receiver price**: In June 1996, almost immediately after it entered the DBS market, EchoStar shocked the industry by announcing a new national pricing plan for the sale of its satellite dish and receiver (for which DIRECTV charged hundreds of dollars more): a \$199 dish system with a one-year, \$300 programming subscription.²⁹ EchoStar asserted that it was “the leader in driving the cost of satellite television down for the American consumer,” and that it knew “that this benchmark price point will force the rest of the DBS industry to re-evaluate their current marketing plans in response to [its] lead.”³⁰ After a few weeks, DIRECTV indeed offered rebates for programming that brought the equipment price to \$199.
- ? **Upfront subscription requirement eliminated**: In May 1997, EchoStar announced that it would allow subscribers to purchase a satellite dish and receiver for only \$199, but that they would no longer need to pay for a year’s subscription upfront.³¹ Charles Ergen stated that EchoStar “fully expect[ed] that, once again, this price point will force the rest of the DBS industry to reevaluate their current offers in response to EchoStar's lead.”³² DIRECTV followed suit two weeks later, eliminating the one-year-advance-purchase requirement so as to “result[] in a lower upfront cost for consumers.”³³
- ? **Discount installation fees**: In July 1997, EchoStar – describing itself as “the leading low-cost provider of direct-to-home satellite television” – announced it would offer consumers the choice of receiving a “free Self-Installation Kit or \$100 off a professional installation.”³⁴ In October, 1997 DIRECTV offered consumers the same deal.³⁵

²⁸ EchoStar Press Release, *EchoStar Unveils a New Generation of Digital Satellite Receivers* (July 23, 1998) (“EchoStar, the company that made satellite television affordable. . .”).

²⁹ EchoStar Press Release, *Dish Network Introduces \$199 DBS System Nationwide* (July 31, 1996).

³⁰ *Id.* (quoting EchoStar’s then-president, Carl Vogel).

³¹ See EchoStar Press Release, *DISH Network Does It Again! More TV, Less Money! EchoStar Continues to Lead the DBS Industry with the Best Value in Satellite Television* (May 28, 1997).

³² *Id.*

³³ DIRECTV Press Release, *DIRECTV to Introduce New Retail Offer* (June 9, 1997).

³⁴ EchoStar Press Release, *EchoStar Announces Free Installation; DISH Network Offers Free Installation Kit or \$100 Off of Professional Installation* (July 25, 1997).

³⁵ DIRECTV Press Release, *DIRECTV Offers \$100 Off Installation for New Subscribers* (Oct. 23, 1997).

- ? **Identical local-to-local pricing:** In November 1999, DIRECTV announced that it would offer local-to-local service and the national PBS feed for \$5.99 per month.³⁶ Five days later, and this time following DIRECTV’s lead, EchoStar announced that it, too, would offer local-to-local service and the national PBS feed for the identical price: \$5.99.³⁷
- ? **Free installation:** On February 23, 2000, EchoStar announced that it would offer free installation as part of a new promotion.³⁸ The very next day, DIRECTV offered a nearly identical deal.³⁹
- ? **Simultaneous price increase:** On March 17, 2000, DIRECTV announced that, beginning May 25, 2000, it would increase the price of all of its programming packages by \$2 per month for new subscribers.⁴⁰ EchoStar announced quickly thereafter that beginning May 1, 2000, it would raise the price of its “most popular package” as well as the HBO multiplex services by \$1 per month.⁴¹ EchoStar used the protection provided by DIRECTV’s price hike to raise the rate for *all* of its subscribers, not just new ones.
- ? **Programming Promotion:** On July 30, 2001, DIRECTV offered four free months of programming to those who subscribed to that programming and purchased the NFL Sunday Ticket at the regular price. DIRECTV characterized this as “the satellite television leader’s most aggressive promotion to date.”⁴² One day later, EchoStar responded with its own fall

³⁶ See DIRECTV Press Release, *DIRECTV Applauds Passage of Satellite Home Viewer Act* (Nov. 19, 1999).

³⁷ See EchoStar Press Release, *DISH Network Launches Local Channels to 33 Percent of U.S. Households* (Nov. 24, 1999).

³⁸ See EchoStar Press Release, *Revolutionary DISH Network Satellite Television Receiver With WebTV Digital Video Recording, Internet Features Now Available With \$199 Rebate – DISHPlayer 500 Now Offered with DISH Network’s Popular One-Rate Plan, Including a FREE Installation!* (Feb. 23, 2000).

³⁹ See DIRECTV Press Release, *DIRECTV Offers New Customers Free Professional Installation* (Feb. 24, 2000) (“DIRECTV . . . today announced . . . [a] new promotion [that] offers consumers *free standard professional installation* of a [DIRECTV] system, a \$200 value, with no long-term subscription commitments”).

⁴⁰ See *DIRECTV To Implement Price Increase For New Customers Beginning May 25, Satellite Today* (March 17, 2000).

⁴¹ See Multichannel News, *DBS Adds More Programming Packages* (Apr. 3, 2000).

⁴² See DIRECTV Press Release, *DIRECTV Unveils Fall National Promotion and Advertising Campaign* (July 30, 2001).

promotion – the so-called “I Like 9” promotion, in which EchoStar offered new subscribers a programming package for \$9 for a limited period when they purchased equipment for \$199 or higher.⁴³

- ? **More local stations at no extra cost:** On December 27, 2001, DIRECTV enriched its local-to-local packages in 41 markets with suites of new local channels. To deliver these additional local channels in these 41 markets, DIRECTV needed to invest many millions of dollars in a new satellite that offered spot-beam capability. Despite this large investment, DIRECTV announced – in a move that surprised industry observers – that it would offer the additional channels “at no extra charge to the \$5.99 per month DIRECTV® local channel package.”⁴⁴ That same day, EchoStar announced that it too would offer an expanded package of local-to-local channels “for the same low \$5.99 monthly price for which only the ABC, CBS, NBC, FOX and PBS stations were previously available.”⁴⁵

B. EchoStar And DIRECTV Compete In Offering Local-To-Local

Beginning no later than early 1997, EchoStar announced plans to deliver local TV stations to local markets by satellite on a limited basis.⁴⁶ And in early 1998, EchoStar began actually doing so in several markets, although with a “two dish” plan that proved unattractive to consumers. During this period, EchoStar regularly boasted that “[t]he DISH Network *is the only satellite television company* to retransmit local TV signals.”⁴⁷

⁴³ EchoStar Press Release, *DISH Network Announces New “I Like 9” Promotion: Over 100 Channels of Satellite Television for Only \$9 a Month* (July 31, 2001).

⁴⁴ DIRECTV Press Release, *More Than 200 Additional Local Channels Now Available to DIRECTV Customers in 41 Markets – New Local Channels Added at No Extra Charge* (Dec. 27, 2001).

⁴⁵ See EchoStar Press Release, *EchoStar's DISH Network To Offer Additional Local TV Channels in 36 Markets* (Dec. 27, 2001).

⁴⁶ EchoStar Press Release, *EchoStar to Launch Local Channels; EchoStar CEO and Chairman Charlie Ergen Offers Statements on Completion of Satellite TV Legislation by Congress* (Nov. 19, 1999).

⁴⁷ EchoStar Press Release, *“The \$49 Professional Installation Special” – DISH Network Launches More Channels for Less Money* (July 31, 1998) (emphasis added).

From 1997 through early 1999, DIRECTV rejected the notion of local-to-local service, contending that consumers could get local programming using antennas in conjunction with their DBS service.⁴⁸ Finally, in 1999, DIRECTV succumbed to EchoStar's competitive pressure and announced that it too would offer local-to-local programming – but that it would make this offer in a consumer-friendly manner using a one-dish solution.⁴⁹ That is, DIRECTV, having lagged behind EchoStar, leapfrogged its rival. EchoStar promptly pledged to match DIRECTV's one-dish innovation.⁵⁰

On passage of SHVIA in November 1999, both companies announced they would start to offer local programming within hours of the President's signing the bill into law.⁵¹ Over the last three years, the cities to which each company has introduced local-to-local services clearly has been driven by competition between the two. DIRECTV and EchoStar now offer local-to-local programming in 41 and 36 local markets, respectively – adding many of the same markets within days of one another.⁵²

⁴⁸ *Hearing on S. 303, The Satellite Television Act of 1999 Before the Senate Committee on Commerce, Science and Transportation*, 106th Cong. (Feb. 23, 1999) (statement of Eddy W. Hartenstein, President, DIRECTV, Inc.).

⁴⁹ DIRECTV Press Release, *DIRECTV To Offer Local Broadcast Network Channels; Leading Satellite TV Service Plans to Offer Local-into-Local Services to 50 Million Homes* (May 5, 1999).

⁵⁰ EchoStar Press Release, *EchoStar Communications Corporation, News Corp. and MCI WorldCom Announce FCC Approval of Transfer of Assets* (May 19, 1999).

⁵¹ See DIRECTV Press Release *DIRECTV Applauds Passage of Satellite Home Viewer Act: Bill Allows Satellite TV Companies to Deliver Local Broadcast Network Channels* (Nov. 19, 1999) (“DIRECTV will begin rolling out local channels in Los Angeles and New York within hours following the President's signature of the new law, and will continue adding markets . . .”); EchoStar Press Release, *EchoStar to Launch Local Channels; EchoStar CEO Chairman Charlie Ergen Offers Statement on Completion of Satellite TV Legislation by Congress* (Nov. 19, 1999) (“Within 24 hours of President Clinton signing the bill into law, EchoStar's DISH Network will offer consumers in [certain markets] . . . their local channels by satellite.”).

⁵² DIRECTV Press Release (Nov. 29, 1999); EchoStar Press Release, *DISH Network Launches Local Channels to 33 Percent of U.S. Households* (Nov. 24, 1999).

EchoStar offers local-to-local programming in only one city where DIRECTV does not.⁵³ The following facts illustrate the relentless competitive jockeying of the two DBS firms on local-to-local offerings:

- ? On November 29, 1999, EchoStar began offering local programming in 13 markets – New York, Boston, Washington, D.C., Chicago, Atlanta, Dallas/Ft. Worth, Miami, Los Angeles, Denver, San Francisco, Phoenix, Pittsburgh, and Salt Lake City.⁵⁴
- ? DIRECTV immediately matched EchoStar's local-to-local service in 11 of these 13 markets,⁵⁵ and added the final two only a few months later.⁵⁶
- ? In late 1999, DIRECTV also initiated local-to-local service in six markets *not* served by EchoStar – Philadelphia, Detroit, Cleveland, Houston, Raleigh-Durham, and Greenville/Spartanburg.⁵⁷ EchoStar immediately matched DIRECTV in two of these new

⁵³ See Appendix D for a detailed history of station carriage.

⁵⁴ EchoStar Press Release, *DISH Network Launches Local Channels to 33 Percent of U.S. Households* (Nov. 24, 1999).

⁵⁵ DIRECTV Press Release, *DIRECTV Commences Local Broadcast Network Channels Offering in New York and Los Angeles: Customers Receive Local Channels with Existing Receiver and 18-inch Satellite Dish* (Nov. 29, 1999); DIRECTV Press Release, *DIRECTV Commences Local Broadcast Offering in Denver and Washington, D.C.: Additional Markets Announced* (Dec. 3, 1999); DIRECTV Press Release, *DIRECTV Commences Local Broadcast Network Channels Offering in San Francisco/Oakland/San Jose Market: Customers Receive Local Channels with Existing Receiver and 18-inch Satellite Dish* (Dec. 3, 1999); DIRECTV Press Release, *DIRECTV Commences Local Broadcast Network Channels Offering in Atlanta* (Dec. 9, 1999); DIRECTV Press Release, *DIRECTV Commences Local Broadcast Network Channels Offering in Phoenix* (Dec. 9, 1999); DIRECTV Press Release, *DIRECTV Commences Local Broadcast Network Channels Offering in Miami/Fort Lauderdale* (Dec. 9, 1999); DIRECTV Press Release, *DIRECTV Commences Local Broadcast Network Channels Offering in Chicago, Cleveland, Dallas and Houston* (Dec. 16, 1999); DIRECTV Press Release, *DIRECTV Offers Local Broadcast Network Channels in Boston, Raleigh/Durham and Greenville/Spartanburg, SC* (Dec. 28, 1999).

⁵⁶ DIRECTV Press Release, *DIRECTV Begins Offering Local Broadcast Network Channels in Salt Lake City* (June 1, 2000); DIRECTV Press Release, *DIRECTV Begins Offering Local Broadcast Network Channels in Baltimore, Pittsburgh and San Diego* (June 30, 2000).

⁵⁷ DIRECTV Press Release, *DIRECTV Commences Local Broadcast Network Channels Offering in Philadelphia* (Dec. 9, 1999); DIRECTV Press Release, *DIRECTV Commences Local Broadcast Network Channels Offering in Detroit* (Dec. 3, 1999); DIRECTV Press Release, *DIRECTV*

markets – Philadelphia and Detroit⁵⁸ – and caught up with DIRECTV in each of the other four markets over the next few months.⁵⁹

- ? EchoStar leapfrogged DIRECTV with two new markets – Minneapolis and Nashville – in late December 1999.⁶⁰ DIRECTV matched Minneapolis within a few weeks and Nashville a few months later.⁶¹
- ? EchoStar added Seattle on January 11, 2000.⁶² DIRECTV followed suit less than a month later.⁶³
- ? On January 31, 2000, EchoStar began local-to-local service in Orlando.⁶⁴ DIRECTV matched EchoStar's offer in that market just three days later.⁶⁵

Commences Local Broadcast Network Channels Offering in Chicago, Cleveland, Dallas and Houston (Dec. 16, 1999); DIRECTV Press Release, DIRECTV Offers Local Broadcast Network Channels in Boston, Raleigh/Durham and Greenville/Spartanburg, SC (Dec. 28, 1999).

⁵⁸ EchoStar Press Release, *DISH Network Offers Local Channels to Detroit, Nashville, Philadelphia and Seattle Via Satellite Television (Dec. 27, 1999).*

⁵⁹ EchoStar Press Release, *DISH Network Offers Local Channels to Houston, Kansas City Via Satellite Television (Jan. 19, 2000);* EchoStar Press Release, *DISH Network Now Offers Cleveland Local Channels Via Satellite Television (Feb. 1, 2000);* EchoStar Press Release, *DISH Network Now Offers Raleigh-Durham Local Channels Via Satellite Television (June 30, 2000);* EchoStar Press Release, *DISH Network Now Offers Greenville, S.C., Metro Area Local Channels Via Satellite Television (Sept. 5, 2000).*

⁶⁰ EchoStar Press Release, *DISH Network Now Offers Local Channels Via Satellite to Minneapolis - St. Paul (Dec. 21, 1999);* EchoStar Press Release *DISH Network Offers Local Channels to Detroit, Nashville, Philadelphia and Seattle Via Satellite Television (Dec. 27, 1999).*

⁶¹ DIRECTV Press Release, *DIRECTV Offers Local Broadcast Network Channels in Minneapolis/St. Paul and Tampa St. Petersburg/Sarasota Beginning Jan. 15 (Jan. 14, 2000);* DIRECTV Press Release, *DIRECTV Offers Local Broadcast Network Channels in Nashville and Kansas City (Sept. 13, 2000).*

⁶² EchoStar Press Release, *DISH Network Now Offers Seattle Local Channels Via Satellite Television (Jan. 11, 2000).*

⁶³ DIRECTV Press Release, *DIRECTV Offers Local Broadcast Network Channels in Orlando and Seattle Beginning Feb. 5 (Feb. 3, 2000).*

⁶⁴ EchoStar Press Release, *DISH Network Now Offers Orlando Local Channels Via Satellite Television (Jan. 31, 2000).*

- ? DIRECTV added Tampa-St. Petersburg in January 2000.⁶⁶ EchoStar countered with the same offer just weeks later.⁶⁷
- ? On February 29, 2000, EchoStar began local-to-local service in Sacramento.⁶⁸ DIRECTV made the same offer just two days later.⁶⁹
- ? On March 2, 2000, DIRECTV added St. Louis.⁷⁰ The very next day, EchoStar did the same.⁷¹
- ? EchoStar added Indianapolis and Charlotte in April 2000.⁷² DIRECTV matched both in July 2000.⁷³
- ? DIRECTV added San Diego on June 30.⁷⁴ EchoStar did the same only five days later.⁷⁵

⁶⁵ DIRECTV Press Release, *DIRECTV Offers Local Broadcast Network Channels in Orlando and Seattle Beginning Feb. 5* (Feb. 3, 2000).

⁶⁶ DIRECTV Press Release, *DIRECTV Offers Local Broadcast Network Channels in Minneapolis/St. Paul and Tampa St. Petersburg/Sarasota Beginning Jan. 15* (Jan. 14, 2000).

⁶⁷ EchoStar Press Release, *DISH Network Now Offers Tampa-St. Petersburg, Florida, Local Channels Via Satellite Television* (Feb. 21, 2000).

⁶⁸ EchoStar Press Release, *DISH Network Now Offers Sacramento Metro Area Local Channels Via Satellite Television* (Feb. 29, 2000).

⁶⁹ DIRECTV Press Release, *DIRECTV Offers Local Broadcast Network Channels in St. Louis and Sacramento/Stockton/Modesto Beginning March 4* (March 2, 2000).

⁷⁰ *Id.*

⁷¹ EchoStar Press Release, *DISH Network Now Offers St. Louis Metro Area Local Channels Via Satellite Television* (March 3, 2000).

⁷² EchoStar Press Release, *DISH Network Now Offers Indianapolis Metro Area Local Channels Via Satellite Television* (April 17, 2000); EchoStar Press Release, *DISH Network Now Offers Charlotte, N.C., Metro Area Local Channels Via Satellite Television* (April 4, 2000).

⁷³ DIRECTV Press Release, *DIRECTV Offers Local Broadcast Network Channels in Charlotte, Indianapolis and Milwaukee* (July 27, 2000).

⁷⁴ DIRECTV Press Release, *DIRECTV Begins Offering Local Broadcast Network Channels in Baltimore, Pittsburgh and San Diego* (June 30, 2000).

⁷⁵ EchoStar Press Release, *DISH Network Now Offers San Diego Metro Area Local Channels Via Satellite Television* (July 5, 2000).

- ? In September 2000, EchoStar added Cincinnati.⁷⁶ DIRECTV matched that offer only two weeks later.⁷⁷
- ? EchoStar added San Antonio in October 2000.⁷⁸ DIRECTV followed suit only a month later.⁷⁹

On January 8, 2002, DIRECTV announced plans to add 10 more local markets by the end of 2002 for a total of **51**.⁸⁰ A new spot-beam satellite planned for 2003 will provide DIRECTV with the capability to serve even more markets. And EchoStar likewise has new spot-beam satellites in the works.

The applicants have stated that in spite of the vast resources of the combined company, the merged EchoStar and DIRECTV will offer local-to-local in only 100 of the nation's 210 DMAs.⁸¹ That low figure reflects the loss of rivalry that would result from the merger: based on the technology parameters outlined in its Joint Engineering Statement, DIRECTV and EchoStar each have enough DBS CONUS capacity to serve *all* 210 markets independently.

⁷⁶ EchoStar Press Release, *DISH Network Now Offers Cincinnati, Metro Area Local Channels Via Satellite Television* (Sept. 5, 2000).

⁷⁷ DIRECTV Press Release, *DIRECTV Begins Offering Local Broadcast Network Channels in Cincinnati* (Sept. 19, 2000).

⁷⁸ EchoStar Press Release, *DISH Network Satellite Television to Offer San Antonio, Texas, Metro-Area Local Channels* (Oct. 2, 2000).

⁷⁹ DIRECTV Press Release, *DIRECTV Offers Local Broadcast Network Channels in Greensboro, N.C. and San Antonio* (Nov. 7, 2000).

⁸⁰ DIRECTV Press Release, *DIRECTV to Launch Local Channels in 10 New Markets this Year* (Jan. 8, 2002).

⁸¹ *Hearing on the Status of Competition in the Multi-Channel Video Programming Distribution Marketplace Before the U.S. House Subcommittee on Telecommunications and the Internet*, 107th Cong. (Dec. 4, 2001) (statement of Charles Ergen, Chairman & CEO, EchoStar Communications Corporation).

C. EchoStar And DIRECTV Vigorously Compete On Programming

EchoStar and DIRECTV have also pushed one another to expand their programming options in a never-ending effort to meet – and to best – each other’s offers.

Sports programming. One of the most ferocious battlegrounds has been sports programming. DIRECTV has always led in this area – beginning with its exclusive contract with the National Football League to offer NFL Sunday Ticket, an extraordinarily popular package that includes nearly all of the NFL games being played nationwide on Sunday.⁸² Since it first offered that "league-wide" sports package in 1994, DIRECTV has added similar packages offered by other sports leagues, and aggressively touted the fact that it – but not EchoStar – offers these packages. The following marketing claims by DIRECTV (from a 2000 brochure) capture the flavor:

"NFL Sunday Ticket – *Mini-Dish Exclusive*"

"NHL Center Ice – *Mini-Dish Exclusive*"

"NBA League Pass – *Mini-Dish Exclusive*"⁸³

With DIRECTV having locked up DBS exclusives on these sports packages, EchoStar has competed for sports fans by seeking alternative sources of attractive sports programming. Most notably, EchoStar has arranged (starting in 1997) to offer *regional* sports packages, which it obtained from competing vendors, such as Fox and Empire Sports Network.⁸⁴ (Unwilling to be bested by EchoStar on any important sports offering, DIRECTV has since arranged to offer largely the same set

⁸² Kagan 2002 at 46.

⁸³ Comments of DirecTV, Inc., [2000] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 00-132, Exhibit A, at 2 (filed Sept. 8, 2000).

of regional sports networks.)⁸⁵ EchoStar has also tried to acquire the rights to as many of DIRECTV's league-wide offerings as possible, and has added foreign sports programming that was not available on DIRECTV.⁸⁶

The following are two of many examples in which DIRECTV "taunted" EchoStar about failing to offer a particular sports package, followed by EchoStar arranging to offer the missing service:

- ? From 1997 to mid-1998, DIRECTV advertised that ESPN Gameplan College Football packages was "Not Available on Any Other Mini-Dish Service!"⁸⁷ On August 4, 1998 EchoStar announced it would offer that package.⁸⁸

⁸⁴ *E.g.*, EchoStar Press Release, *EchoStar Announces Multi-Sport Package on DISH Network for Out-of-Market Sports Programming* (Dec. 9, 1997).

⁸⁵ See DirecTV web site, <www.directv.com/channels.htm> visited Feb. 3, 2002 (listing more than 20 Fox regional sports networks).

⁸⁶ EchoStar Press Release, *DISH Network Offers Exclusive 1999 Cricket World Cup Broadcast* (May 7, 1999) ("EchoStar . . . announced today that DISH Network is *the only satellite television programming provider* to offer the 1999 Cricket World Cup, the most important summer event broadcast live from the United Kingdom.") (emphasis added); EchoStar Press Release, *DISH Network Offers FOX Sports International Cricket Matches on Pay-Per-View; Call 1-800/333-DISH to Order Aiwa Cup and Coca-Cola Singapore Challenge Cricket Packages* (Aug. 23, 1999); EchoStar Press Release, *DISH Network Scores English Premier League Soccer* (Aug. 6, 1999); SkyReport, *DISH Delivers Portuguese Soccer* (July 19, 2001).

⁸⁷ "DIRECTV Sports Lineup," within Attachment A to Comments of DIRECTV, Inc. [1997] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 97-141 (filed July 23, 1997) ("ESPN GamePlan College Football – *Not Available on Any Other Mini-Dish Service!...*"); DIRECTV Web Site, at <<http://web.archive.org/web/19980202150615/www.DIRECTV.com/programming/compare.html>> (Oct. 1, 1997) (comparison chart showing that DIRECTV offers ESPN Gameplan College Football package, but EchoStar does not).

⁸⁸ EchoStar Press Release, *DISH Network to Offer ESPN Gameplan College Football Pay-Per-View Package – Direct-to-Home Satellite Service to Offer Up to 100-Game Schedule* (Aug. 4, 1998).

- ? From 1997 until late 1999, DIRECTV offered ESPN Full Court College Basketball, and prominently advertised that it was the only DBS firm to offer the service.⁸⁹ In October 1999, EchoStar announced that it too would offer the same programming package.⁹⁰

Movies. EchoStar has likewise played catchup in offering movie channels, as the following episode illustrates:

- ? In 1997, DIRECTV advertised in a comparison chart of programming that, unlike EchoStar and cable, DIRECTV offered the STARZ! and Encore movie packages.⁹¹
- ? In response, EchoStar added Encore and STARZ! to its programming options just three months later.⁹²

International Programming. The two firms have fought countless battles to one-up each other in offering international programming. DIRECTV struck first by announcing in January 1998 that it would offer six ethnic programming channels from Ethnic-American Broadcasting Company, L.P., and that it was developing a new package of Hispanic programming (which launched as DIRECTV PARA TODOS™ on October 15, 1999).⁹³

⁸⁹ “DIRECTV Sports Lineup,” within attachment A to Comments of DIRECTV, Inc. [1997] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 97-141 (filed July 23, 1997) (“ESPN Full Court College Basketball – *Not Available on Any Other Mini-Dish Service!...*”); DIRECTV Web Site, at <<http://web.archive.org/web/19980202150615/www.DIRECTV.com/programming/compare.html>> (Oct. 1, 1997) (comparison chart showing that DIRECTV offers ESPN Full Court College Basketball package, but EchoStar does not).

⁹⁰ EchoStar Press Release, *DISH Network Scores ESPN Full Court; College Basketball Fans Get Front Row Seats with More Than 450 Games on DISH-On-Demand* (Oct. 12, 1999).

⁹¹ DIRECTV Web site at <www.web.archive.org/web/19980202150615/www.DIRECTV.com/programming/compare.html> (Oct. 1, 1997).

⁹² EchoStar Press Release, *DISH Network Adds STARZ! and Encore*, (Dec. 9, 1997) (“Beginning December 31, 1997, DISH Network will offer Encore and STARZ!”).

⁹³ DirecTV Press Release, *DIRECTV, Inc. Expands Satellite Capacity at 95 Degrees West Longitude to Add Niche and Special Interest Programming* (Jan. 20, 1998). (Ethnic-American’s

Not wanting to fall behind in this area as it had in sports, EchoStar responded quickly, announcing the addition of Japanese, French and Portuguese channels in March 1998 and claiming that EchoStar was “*the leading international programming services.*”⁹⁴ In July 1998, EchoStar announced its SkyVista ethnic service⁹⁵ and added Polish, Asian, Hindi and Arabic language channels.⁹⁶

The competition between the two firms for international programming has been so aggressive that EchoStar actually *acquired* one of the principal providers of that programming (Kelly Broadcasting), which had previously agreed to deliver 16 foreign-language channels to EchoStar's arch-rival, DIRECTV.⁹⁷ In purchasing the firm, EchoStar boasted that it was “*already the industry leader in delivering our U.S. customers their favorite international programming*” and that the acquisition of Kelly would only enhance that dominance.⁹⁸

channels includes Italian, Russian, Ukrainian, Arabic, Asian/Indian, Indo-Asian, Greek, Chinese, and Filipino programming); DirecTV Press Release, *DIRECTV PARA TODOS™ Spanish-Language Programming to Launch Oct. 15* (Sept. 23, 1999).

⁹⁴ EchoStar Press Release, *EchoStar Announces DISH Network's New International Programming* (Mar. 18, 1998) (emphasis added).

⁹⁵ EchoStar Press Release, *EchoStar, Loral SkyNet to Begin New Satellite Television Programming Service in October* (July 23, 1998).

⁹⁶ EchoStar Press Release, *Dish Network Increases International Programming Choices* (July 6, 1998).

⁹⁷ DirecTV Press Release, *DirecTV Reaches Agreement with Kelly Broadcasting to Broadcast Slate of Ethnic Networks* (Dec. 16, 1999); EchoStar Press Release, *Dish Network Acquires Kelly Broadcasting Systems* (Mar. 16, 2000).

⁹⁸ EchoStar's aggressive move led to litigation, which DirecTV won. See *DirecTV Wins Arbitration in DISH/Kelly Case* (Oct. 4, 2001) at <www.skyreport.com/skyreport/oct2001/100401.htm#four>.

Thanks to this bitter rivalry, EchoStar and DIRECTV today each offer a range of international programming that dwarfs that offered by any cable system.

D. Rivalry Has Pushed EchoStar And DIRECTV To Achieve Tremendous Technological Innovation

Both companies compete to offer subscribers new innovations to enhance their viewing of DBS services before the other can. For example:

- ? DIRECTV announced on May 5, 1999 that it would soon be making a new dual-feed dish that could receive local programming and other programming packages from multiple full-CONUS DBS slots.⁹⁹ Two weeks later, EchoStar also announced that it too would offer a single dual-feed dish to provide local to local.¹⁰⁰
- ? In January 1999, EchoStar announced interactive multimedia programming.¹⁰¹ DIRECTV followed a few months later, announcing that it would be offering interactive and data enhanced television services through alliances with America Online, TiVo and Wink Communications.¹⁰²
- ? EchoStar pioneered the distribution of personal video recorders built into set-top boxes in 1999.¹⁰³ DIRECTV soon offered the same feature.¹⁰⁴ These features, while available to all DBS customers, are not typically available as part of cable set-top boxes.

⁹⁹ DIRECTV Press Release, *DIRECTV To Offer Local Broadcast Network Channels; Leading Satellite TV Service Plans to Offer Local-into-Local Services to 50 Million Homes* (May 5, 1999).

¹⁰⁰ EchoStar Press Release, *EchoStar Communications Corp., News Corp., and MCI WorldCom Inc. Announce FCC Approval of Assets* (May 19, 1999).

¹⁰¹ EchoStar Press Release, *EchoStar Announces Interactive Television Broadcast Agreement* (Jan. 7, 1999).

¹⁰² DIRECTV Press Release, *DIRECTV Turns 5 Years Old; Nation's Leading Digital Television Service Celebrates Landmark Year in Jackson, Miss. Where the First DIRECTV System Was Sold* (June 17, 1999).

¹⁰³ EchoStar Press Release, *EchoStar to Offer New Personal Television Services for DISH Player – World's First Combination Internet/Satellite TV Receiver* (July 19, 1999)

¹⁰⁴ DIRECTV Press Release, *DIRECTV and TiVo Announce National Availability of the DIRECTV Receiver with TiVo* (Nov. 2, 2000).

- ? On December 8, 1999, DIRECTV announced that it had ordered a spot beam satellite to more efficiently deliver its local channels.¹⁰⁵ EchoStar announced its own order for spot-beam satellites two months later.¹⁰⁶
- ? On January 8, 2002, DIRECTV announced it would make additional interactive service available to consumers through DIRECTV INTERACTIVE.¹⁰⁷ The next day, EchoStar announced that it too would offer new interactive features.¹⁰⁸

E. EchoStar And DIRECTV Compete In The Deployment Of Advanced Services

EchoStar and DIRECTV compete to provide subscribers with additional services such as broadband high-speed Internet and interactive television.

- ? On February 2, 1999 EchoStar acquired Media4 Inc. and Charles Ergen announced that ““Media4 is an integral link in our continuing effort to bring interactive television to consumers and helps to establish EchoStar as a leader in educational, business television and data delivery applications.””¹⁰⁹
- ? On March 17, 1999, DIRECTV announced it would invest \$1.4 billion in Spaceway Broadband Satellite System, with the stated goal of ““establish[ing] satellites as the preeminent means of delivering broadband services.””¹¹⁰
- ? On April 19, 1999, EchoStar announced that it would work with SkyStream Data Injection Equipment to insert data into the transport stream to reclaim lost bandwidth.¹¹¹

¹⁰⁵ DIRECTV Press Release, *DIRECTV Orders High-Power Spot Beam Satellite From Hughes Space & Communications* (Dec. 8, 1999).

¹⁰⁶ EchoStar Press Release, *EchoStar Announces Construction Plans for Three New Satellites* (Feb. 23, 2000).

¹⁰⁷ DIRECTV Press Release, *DIRECTV, NBC and Wink Communications to Launch NBC Virtual Channel on DIRECTV INTERACTIVE Service* (Jan. 8, 2002).

¹⁰⁸ EchoStar Press Release, *EchoStar to Launch New Interactive TV Features Offering Games, Movie Reviews and Customer Support Services for Dish Network Satellite TV Customers* (Jan. 9, 2002).

¹⁰⁹ EchoStar Press Release, *EchoStar Acquires Media4* (Feb. 2, 1999).

¹¹⁰ DIRECTV Press Release, *Hughes to Invest \$1.4 Billion in Spaceway Broadband Satellite System*.

- ? On June 21, 1999, DIRECTV announced a strategic alliance with America Online, Inc. to provide high-speed satellite delivered data services to AOL members through DirecPC.¹¹²
- ? In September 2001, EchoStar announced a \$50 million investment in StarBand to further its “strategy to offer a bundled package of Internet, programming and interactive television services to its more than 6 million DISH Network customers.”¹¹³
- ? A month later, DIRECTV announced deals with Verizon and Qwest to expand DSL services using DIRECTV Broadband.¹¹⁴
- ? That same month, EchoStar announced that it launched its high-speed, two-way satellite Internet service in Hawaii “making its broadband service available to all 50 states.”¹¹⁵

F. EchoStar And DIRECTV Compete For Distribution

EchoStar and DIRECTV compete vigorously for product distribution through retailers. This merger will end any benefits that consumers enjoy, including specialized pricing and promotion that retailers promise to secure distribution, from that competition.¹¹⁶ In the instant case, the competition between EchoStar and DIRECTV to “get on the shelf” became so fierce that EchoStar filed a lawsuit against DIRECTV alleging, among other things, that DIRECTV used its exclusive relationships with

¹¹¹ EchoStar Press Release, *EchoStar to Use Skystream Equipment to Deliver Broadband Data Services to DISH Network Customers: Major DBS Provider to Integrate SkyStream Data Injection Equipment to Augment DISH Network with Data Broadcasting Channels and Services* (Apr. 19, 1999).

¹¹² DIRECTV Press Release, *America Online and Hughes Electronics Form Strategic Alliance to Market Unparalleled Digital Entertainment and Internet Services* (June 21, 1999).

¹¹³ Skyreport, *Dish Completes Starband Deal* (Sept. 28, 2001).

¹¹⁴ Skyreport, *DIRECTV Broadband, Verizon Team to Expand DSL Service* (Oct. 16, 2001).

¹¹⁵ Skyreport, *StarBand Debuts in Hawaii* (Oct. 25, 2001).

¹¹⁶ See, e.g., *Heinz*, 246 F.3d at 718-19 (examining effects of manufacturer’s competition to secure distribution with retailers).

national electronics retailers to monopolize the high-power DBS market.¹¹⁷ Any consumer benefits arising out of the competition to secure exclusive distribution arrangements will be lost after this merger.

In sum, the record of head-to-head competition is undeniable and belies the applicants' novel post-filing claim that the two DBS companies do not compete with each other, but only with cable. The loss of this competition – for consumers and broadcasters – is real and cannot be swept away to justify a merger that would gravely harm the public.

IV. THE PROPOSED MERGER WOULD HARM THE PUBLIC INTEREST BY ELIMINATING COMPETITION ENTIRELY IN MANY LOCAL MARKETS AND AT BEST CREATING A DUOPOLY IN MOST OTHER LOCAL MARKETS

An essential component of the Commission's public interest review of merger-related license transfer applications is to consider the competitive effects of the proposed transaction.¹¹⁸ The

¹¹⁷ Complaint, *EchoStar Communications Corp. v. DIRECTV*, No. 00-212, ¶ 52 (D. Colo. 2000).

¹¹⁸ See *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953) (“There can be no doubt that competition is a relevant factor in weighing the public interest”); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order (“*AOL-Time Warner Order*”), 16 F.C.C.R. 6547, 6550 ¶ 4 (2001) (“The Commission’s review encompasses an examination of anticompetitive effects but also evaluates . . . the potential impact of the proposed transaction on the rules, policies and objectives of the Communications Act.”); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor To AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 F.C.C.R. 9816, 9821 ¶ 10 (2000) (“The Commission’s analysis of public interest benefits and harm includes, among other things, consideration of the possible competitive effects of the transfer.”); see also *In the Applications of NYNEX Corporation Transferor and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 F.C.C.R. 19,985, 20,008 ¶ 37 (1997) (“*Bell Atlantic-Nynex Order*”) (“In evaluating the competitive impact of a proposed merger and thus whether a proposed merger will enhance competition, we use a framework for competitive analysis that we use for assessing market power in other contexts and that is also

Commission considers not only whether the merger will likely lessen competition, but whether the merger will affirmatively promote future competition: “[t]o find that a merger is in the public interest, therefore, the Commission must ‘be convinced that it will enhance competition.’”¹¹⁹ Determining the acquisition’s likely effect on competition “turns on the purchaser’s potential for creating, enhancing, or facilitating the exercise of market power – the ability of one or more firms to raise prices above competitive levels for a significant period of time.”¹²⁰ As the Merger Guidelines emphasize, “mergers should not be permitted to create or enhance market power or to facilitate its exercise.”¹²¹

To predict whether, post-merger, one or more firms “possesses or is likely to possess market power or monopoly power,” merger analysis requires the definition of the relevant market.¹²²

Accordingly, “the first step in analyzing a merger is to define the relevant product and geographic markets.”¹²³ “In defining the relevant product and geographic markets, the Commission follows the

embodied in the antitrust laws, including the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines and the April 8, 1997 revisions.”).

¹¹⁹ *AOL-Time Warner Order*, 16 F.C.C.R. at 6550 ¶ 21.

¹²⁰ *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988), *cert. denied*, 493 U.S. 809 (1989); *see Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4th Cir. 1986), (“The penultimate question, towards which this preliminary inquiry into market definition is directed, is whether the defendant has market power: the ability to raise prices above levels that would exist in a perfectly competitive market.”), *cert. denied*, 481 U.S. 1050 (1987).

¹²¹ *Merger Guidelines* § 0.1.

¹²² ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 493(4th ed. 1997) (“ALD”); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 136 (E.D.N.Y. 1997) (citing *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 363 (1963)) (antitrust analysis condemns mergers where “the merged entity will have a large percentage of the ‘relevant market,’ so that it may raise prices above competitive levels”).

¹²³ *In the Matter of The Merger of MCI Communications Corp. and British Telecomm. plc*, 12 F.C.C.R. 15,351, ¶ 35 (1997).

approach taken in the *LEC In-Region Interexchange Order*, which in turn was based on the approach taken in the 1992 Horizontal Merger Guidelines.”¹²⁴ Here, the merger would totally eliminate competition in many local markets, leaving a single monopoly gatekeeper. In most other local markets, the merger would either also totally eliminate competition or, at best, depending on whether the product market is defined as DBS or MVPD, create a gatekeeper duopoly. In either event, competition would be severely reduced.

A. The Relevant Geographic Markets Are Local And Virtually All Will Face Reduced Competition

The Commission has generally considered that the relevant geographic market for multichannel video programming service is local.¹²⁵ Local markets have been defined as local franchise areas in cable mergers, and as Designated Market Areas (DMAs) in matters involving television.¹²⁶ Both markets are appropriate from an economic perspective. On the demand side, it is appropriate to

¹²⁴ *Id.*

¹²⁵ See *AOL-Time Warner Order*, 16 F.C.C.R. at 6647 ¶ 244 (“One or more MVPD providers furnish MVPD services in local franchise areas. Only one cable operator serves most franchise areas.”); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order (“*AT&T-TCI Order*”), 14 F.C.C.R. 3160, 3172 ¶ 21 (1999) (“Consumers in a local cable franchise area cannot switch to alternative MVPD services that are not offered in the same local service area.”).

¹²⁶ See *In the Matter of Cross-Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01-235, Order and Notice of Proposed Rule Making, 16 F.C.C.R. 17,283, 17,298 (Sept. 20, 2001) (“We have recognized that the commonly accepted geographic market for TV is the Designated Market Area, or DMA, defined by Nielsen Media Research”). *In the Matter of Review of the Commission’s Regulations Governing Television Broadcasting*, MM Docket No. 99-221, Report & Order, 14 F.C.C.R. 12903, 12926-12929 (August 6, 1999) (“We have chosen this DMA test based on our belief that . . . DMAs are a better measure of actual viewing patterns, and thus serve as a good measure of the economic marketplace . . .”).

examine “the local distribution market because cable operators generally acquire programming on the national level and distribute it on the local level through their locally franchised systems.”¹²⁷ Similarly, from the point of view of consumers, they can choose only from the programming sources available in their local area. On the supply side, for the local broadcaster members of the NAB, the relevant market is also local. Broadcasters serve local markets through over-the-air broadcasting and through distribution via gatekeeper MVPDs serving their local broadcast areas. Originally the only significant MVPDs serving local areas were cable companies. Since the passage of SHVIA, the DBS carriers also offer a localized product.

EchoStar’s economist, Dr. Robert Willig, makes a brief and conclusory assertion that the merger should be analyzed on a national basis.¹²⁸ However, he is clearly wrong, as Dr. Sidak explains. In defining markets, the Merger Guidelines focus on demand substitution factors, i.e., possible consumer responses. Thus, a consumer in Washington, D.C. faced with an MVPD’s price increase will not benefit from a lower price offered by a cable company in Philadelphia.¹²⁹

B. The Merger Will Eliminate Or Dramatically Curtail Competition In The Relevant Product Markets

“[D]efining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take

¹²⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, Eighth Annual Report, ¶ 116, at 55 (Jan. 14, 2002); see *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 359 (1963) (geographic market is “area of effective competition” where purchasers “can practicably turn for supplies”) (citation omitted).

¹²⁸ Declaration of Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, ¶ 18 (Nov. 30, 2001) (“Willig Decl.”).

¹²⁹ Sidak Decl. ¶¶ 20, 76 and 77.

significant amounts of business away from each other.”¹³⁰ “The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”¹³¹

In the past, the Commission and the Department of Justice have found an overall MVPD market in mergers involving video programming.¹³² The overwhelming majority of MVPD subscribers are cable or DBS customers.¹³³ Finding such a market, however, does not preclude the existence of submarkets within the overall market.¹³⁴ For example, in *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997), the district court held that a relevant market existed for the overall sale of office supplies, but that the merger should be considered in the relevant market of office supplies *sold through office superstores* because distribution and pricing evidence supported the existence of a narrower

¹³⁰ *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978).

¹³¹ *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

¹³² See, e.g., *AOL-Time Warner Order*, 16 F.C.C.R. at 6647 ¶ 244 (examining AOL/Time Warner “merger’s potential effects on the video services provided by multichannel video programming distributors”); Complaint, ¶ 59, *United States v. Primestar, L.P.*, No. 1:98CV01193 (JLG) (D.D.C. filed May 12, 1998) (“The relevant product market affected by this transaction is the delivery of multiple channels of video programming directly to the home. . . . This product market is referred to by the FCC, as well as the industry generally, as multichannel video programming distribution, or MVPD.”).

¹³³ Other MVPDs include multichannel multipoint distribution services (“MMDS”), satellite master antenna television (“SMATV”) providers, cable overbuilders and C-band satellite. See *AT&T-TCI Order* at 3172 ¶ 21. It is estimated collectively they represent less than 2.5% of the MVPD market. See Eighth Annual Report, at 6-7.

¹³⁴ See *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1332 (7th Cir. 1981) (approving the FTC’s definition of submarkets for conventional bricks and for BOF bricks for the purpose of a merger analysis); *FTC v. Cardinal Health*, 12 F. Supp. 2d 34 (D.D.C. 1998) (recognizing narrower market for wholesale prescription drug distributors that exists for antitrust purposes within a broader market for drug delivery).

relevant market.¹³⁵ Here there is strong evidence of a separate DBS market or, at a minimum, that DBS is a highly differentiated product from cable.

1. EchoStar Has Repeatedly Asserted The Existence Of A Separate DBS Market

Using the principles enunciated in *Staples*, EchoStar itself has consistently maintained (except in its recent license transfer application) that DBS constitutes a separate market.¹³⁶ In February 2000, EchoStar filed an antitrust suit against DIRECTV and three large electronics retailer chains for monopolization and group boycotts, alleging that DIRECTV had 65 percent of the “High-Power DBS Market.”¹³⁷ EchoStar alleged, among other things, that DIRECTV: (1) signed exclusive dealing contracts with electronics retailers, (2) organized a group boycott by national retailers, (3) conspired with HDTV manufacturers to exclude EchoStar from the HDTV market, (4) paid professional sports leagues to refuse to accept EchoStar’s bids, and (5) falsely disparaged EchoStar’s products.¹³⁸

¹³⁵ See 970 F. Supp. at 1075 (“The Supreme Court has recognized that within a broad market, ‘well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.’”) (quoting *Brown Shoe*, 370 U.S. at 325). Consideration of the effects of the license transfer application in a DBS market is not precluded by the Department of Justice’s 1998 suit against the News Corporation and MCI to prevent the transfer of its DBS slot to Primestar, an entity controlled by five large cable companies. See *United States v. Primestar, Inc.*, No. 1:98CV01193 (D.D.C. filed May 12, 1998). There, the Division considered the effect of the slot’s transfer in an MVPD market including cable companies because of their involvement in the purchase of scarce full-CONUS spectrum and the competitive effects of their potential non-use of it. The Division, however, did not face the question of whether a narrower market of satellite distribution also existed.

¹³⁶ Notably, one of the *Brown Shoe* criteria for defining a market is the “industry or public recognition of the submarket as a separate economic entity.” *Brown Shoe*, 370 U.S. at 325.

¹³⁷ Complaint, ¶ 126, at 31, *EchoStar Communications Corp. v. DIRECTV Entertainment Corp.*, Civ. No. 00-K-212 (D. Colo. 2000).

¹³⁸ *Id.* ¶¶ 137-54, at 33-35.

In November 2000, EchoStar filed a Rule 56(f) motion opposing a summary judgment motion by DIRECTV. DIRECTV argued that the overall MVPD market was the relevant product market. In response, EchoStar argued:

The relevant market for this case is not the MVPD Market, but rather a submarket of the MVPD Market known as the High Power DBS Market. . . . EchoStar does not dispute that there is an MVPD Market and that both EchoStar and DIRECTV compete with cable companies in that market. ***However, the DBS Market is an appropriate submarket of the MVPD market for antitrust purposes.***¹³⁹

In that motion, EchoStar claimed that it had “already uncovered some documents in which DIRECTV admits that the relevant market is the DBS Market” and that DIRECTV had “produced outside investment reports that recognize the DBS Market as a separate and distinct market.”¹⁴⁰

EchoStar sought further discovery to more fully establish several facts:

- a) ***DBS is a separate product market*** from alternative sources of programming, including cable television;
- b) A significant number of DBS subscribers view ***DIRECTV and EchoStar*** as a ***significantly closer substitutes than*** alternative sources of programming, including ***cable television***;
- c) ***Cable television*** is an ***imperfect and comparatively weak substitute*** for DBS;
- d) If not constrained by EchoStar, DIRECTV could raise its prices above the competitive level without experiencing a significant constraint by cable;
- e) DBS and/or High Power DBS is superior to most cable services in several respects, including higher quality picture, substantially more programming and options, and pay-per-view in a “near-on-demand” environment that consumers find more attractive than the pay-per-view environment offered by cable;

¹³⁹ Request for Rule 56(f) Continuance to Respond to DIRECTV Defendants’ Motion for Summary Judgment and Memorandum of Law in Support Thereof at 7-8, *EchoStar Communications Corp. v. DIRECTV Entertainment Corp.*, Civ. No. 00-K-212 (D. Colo. Nov. 6, 2000) (“Rule 56(f) Motion”) (emphasis added).

¹⁴⁰ Rule 56(f) Motion, at 13.

f) *Significant numbers of consumers have subscribed to both DBS and/or High Power service and cable service, reflecting that the two products are imperfect substitutes;*

g) *EchoStar is DIRECTV's closest competitor;*

h) Many, if not most, *consumers who would switch away from EchoStar if it raised its prices* relative to all other subscription programming services *would turn to DIRECTV;*

...

k) DIRECTV and EchoStar react primarily to each other when setting equipment and service prices;

...

m) Millions of potential DBS and/or High Power DBS customers live in areas that do not have access to cable such that, if there is no competition between DIRECTV and EchoStar, there is no competition at all[.]¹⁴¹

Then, less than a year ago, EchoStar filed an amended complaint and continued to allege that the two DBS firms compete in a “High-Power DBS Market.”¹⁴² EchoStar alleged that “[h]igh-power DBS subscription TV programming service consists of television programming, offered in various packages with varying monthly subscription fees.”¹⁴³ EchoStar alleged both supply and demand side reasons for excluding non-DBS television from the relevant market:

No other product duplicates or fully substitutes for the high-power DBS dish antenna, receiver or switch, or for the high-power DBS subscription TV programming service [and] customers in the High-Power DBS Market do not consider either over-the-air

¹⁴¹ Decl. of Cynthia A. Ricketts ¶ 14, at 4-6, *EchoStar Communications Corp.*, Civ. No. 00-K-212 (D. Colo. Nov. 6, 2000) (emphasis added).

¹⁴² Amended Complaint, ¶ 76, at 24, *EchoStar Communications Corp. v. DIRECTV Entertainment Corp.*, Civ. No. 00-K-212 (D. Colo. filed Apr. 5, 2001).

¹⁴³ *Id.* ¶ 78.

broadcast signals or cable TV equipment and service to be effective substitutes for high-power DBS equipment and high-power DBS subscription TV programming service.¹⁴⁴

Only now, following its deal with DIRECTV, does EchoStar maintain in its filing to the Commission that MVPD is the only proper market. EchoStar now wishes to retreat from its adamant posture, in almost two years of litigation, that a DBS market exists in which there are but two competitors, the merging parties.¹⁴⁵ Instead, in late December of 2001, Mr. Ergen cavalierly dismissed his market theory, stating that he does not *“think anybody in this business takes seriously private litigation where somebody is trying to get distribution into consumer electronic stores at its face value in a merger where the end goal is to compete against cable.”*¹⁴⁶ Yet even when discounting his prior position in court, Mr. Ergen reaffirmed the reasoning behind his firm’s litigation position: *“we believe that there was a submarket of satellite, and still believe, that there is a submarket of satellite, particularly in rural [areas].”*¹⁴⁷

2. Consumers See DBS As Significantly Differentiated From Cable

EchoStar’s view of DBS as significantly differentiated from cable has considerable basis in fact, especially as to analog cable. Although digital cable is evening the divide somewhat, it remains available only to some of the households that are passed by any type of cable, and even digital cable continues to

¹⁴⁴ *Id.* ¶¶ 78-79.

¹⁴⁵ EchoStar dropped its lawsuit when the merger was announced.

¹⁴⁶ *Ergen* at 11 (emphasis added).

¹⁴⁷ *Id.* (emphasis added).

lag behind DBS in available features and customer satisfaction. Satellite industry research confirms the view that DBS is a differentiated product. A 2000 DBS industry study reported that:

Cable subscribers are most susceptible to another cable provider. 26% of cable households said that they would be very or somewhat likely to switch to another cable provider. In comparison, *DBS households are most susceptible to another DBS provider*. 29% of DBS households said that they would be very or somewhat likely to switch to another DBS provider.¹⁴⁸

Some of the numerous distinctions customers perceive between DBS and cable are described below.

a. DBS Offers Many More Channels Of Programming Than Most Cable Systems

DBS offers many more channels of programming than analog cable services, and offers many channels that are not available on any cable system at all. According to EchoStar's and DIRECTV's Joint Filing Statement filed with the FCC, EchoStar already offers 235 national channels and DIRECTV offers 179.¹⁴⁹ By contrast, households served by cable have access to an average of 68 channels.¹⁵⁰ As DIRECTV's web site indicates, DBS offers channels that are not available on any cable system:

How does DIRECTV compare with cable? DIRECTV has created a programming service specifically driven to offer customers more choice and value for their entertainment dollar. DIRECTV combines America's favorite network channels, other popular networks not available from many cable services, a pay per view movie service with up to 55 choices of movies and special events a day, local channels in many

¹⁴⁸ *Competitive Market Study 2000*, The Yankee Group (sponsored by SBCA) at 30 (emphasis added).

¹⁴⁹ See *Consolidated Application for Authority to Transfer Control*, Attachment B: Joint Engineering Statement of EchoStar Communications Corporation and Hughes Electronics Corporation at 9 (Dec. 3, 2001).

¹⁵⁰ See *Competitive Market Study 2000*, at 9.

markets, and an unprecedented sports subscription lineup. No other system offers as many quality program options.¹⁵¹

b. The Picture and Sound Quality Available Through DBS Is Superior to Cable

DBS signals – no matter where they are delivered – are always transmitted digitally, which results in greatly improved sound and picture quality as compared to analog cable.¹⁵² And even in those areas that are nominally served by digital cable, that service generally does not deliver all signals in digital format: “[M]ost digital-cable services are actually hybrids” of digital and analog services, delivering “additional ‘DTV’ channels and premium and pay-per-view services . . . in digital, and the remainder in analog.”¹⁵³ Similarly, the sound quality offered by DBS is vastly superior to analog and even digital cable. While DBS “delivers the five- and six-channel Dolby Digital soundtracks of certain movies (and some network programming),” many cable companies “are not yet equipped to transmit multichannel audio in anything better than two-channel stereo, even with digital service.”¹⁵⁴ EchoStar’s and DIRECTV’s own comments before the FCC – filed just before the merger announcement – reflect this same market reality.¹⁵⁵ Until digital cable becomes the standard – and until digital cable delivers all of its channels in digital format – this will remain a key distinction between the two markets.

¹⁵¹ See DIRECTV website, <<http://www.DIRECTV.com/>>

¹⁵² See *TV: The Digital Decision*, CONSUMER REPORTS, Sept. 2001, at 36, 38.

¹⁵³ *Id.* at 38.

¹⁵⁴ *Id.*

¹⁵⁵ See Comments of EchoStar Satellite Corp., In the Matter of: Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 01-129, at 15 (filed Aug. 3, 2001) (“Greater reliability and superior picture and sound quality are among the primary reasons that consumers choose DBS.”); Reply Comments of DIRECTV, Inc., In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS

c. DBS Offers Many More Pay-Per-View Options

DBS has a clear advantage over cable when it comes to pay-per-view options. For example, Consumer Reports notes that analog cable only offers up to six channels of pay-per-view channels, while DBS offers 55 channels of pay-per view, including “some exclusive events not available on cable.”¹⁵⁶

d. DBS Offers More And Richer Sports Packages

DBS offers consumers a much wider array of sports packages than analog and even digital cable. For example, DIRECTV offers a vast array of sports packages, including NFL Sunday Ticket, NBA League Pass, NHL Center Ice, and WNBA Season Pass, and EchoStar offers a variety of channels dedicated to regional sports.¹⁵⁷ (The NFL Sunday Ticket package is entirely exclusive to DIRECTV, and is not available on cable.) For these reasons, it is simple to conclude – as EchoStar already has – that “High Power DBS is the only choice for consumers desiring a broad range of premium sports broadcasting, such as access to all professional sports league games.”¹⁵⁸

e. DBS Customer Service Is Better Than Cable

As an industry, DBS offers much better customer service than cable. According to Consumer Reports, “cable companies received among the lowest marks of any service providers we regularly

Docket No. 01-129, at 2 (filed Sept. 5, 2001) (referring to “the competitive advantages in reliability, sound and picture quality that DBS providers use affirmatively to differentiate themselves in the MVPD marketplace . . .”).

¹⁵⁶ See CONSUMER REPORTS at 39.

¹⁵⁷ See <<http://www.directsports.com/subscriptions>>; <<http://www.dishnetwork.com/content/programming/packages/sports/index.shtml>>

evaluate – even lower than those for technical support from computer manufacturers.”¹⁵⁹ The DBS industry, on the other hand, earns consistently high marks for customer service. In 2000, for example, the Yankee Group found “74% of DBS subscribers rated their service provider as ‘excellent’ or ‘very good.’”¹⁶⁰ Illustrating this clear divide, every year from 1997 until 2001, the well-known consumer research firm J.D. Power & Associates found that a DBS firm ranked the highest in its annual Cable/Satellite TV Customer Satisfaction Study.¹⁶¹ And although a small cable overbuilder (Americast) ranked first in the study released in September 2001, J.D. Power & Associates was quick to point out that “satellite companies as a whole still outperform cable companies in customer satisfaction.”¹⁶²

C. This Will Be A Merger To Monopoly In Large Areas Of The Country Encompassing Many Millions Of Consumers And Hundreds Of Television Stations

As the fundamental differences between DBS and cable reveal, there is substantial factual support for EchoStar’s claims in its DIRECTV litigation that there is a DBS market as well as an overall

¹⁵⁸ Ricketts Decl. ¶ 14(n) (emphasis added).

¹⁵⁹ See CONSUMER REPORTS at 36. To be sure, EchoStar’s sharp practices with some of its customers have led to a substantial number of complaints by those affected.

¹⁶⁰ See The Yankee Group, *DBS Subscriber Study 2000*, at 20 (sponsored by SBCA).

¹⁶¹ See J.D. Power & Associates Press Release, *J.D. Power and Associates Reports: Dish Network Ranks Highest in Overall Customer Satisfaction Among Cable/Satellite TV Companies* (Sept. 6, 2000) (announcing that EchoStar’s Dish Network ranked highest “for the second year in a row,” and was “followed closely by DIRECTV”); *J.D Power Says DBS Still King*, COMMUNICATIONS TODAY (Sept. 11, 1998) (“For the second consecutive year, Primestar . . . received the highest overall customer satisfaction score of 14 pay TV providers, with EchoStar’s . . . Dish Network following one point behind and DIRECTV six points behind . . .”).

¹⁶² J.D. Power & Associates Press Release, *J.D. Power and Associates Reports: Ameritech’s Americast Service Ranks Highest In Overall Customer Satisfaction Among Residential Cable/Satellite TV Subscribers* (Sept. 6, 2001).

MVPD market. In areas with no cable service, of course, it will be a merger to monopoly whether the market is DBS or MVPD.

Monopoly power gives a monopolist “the power to control market prices or exclude competition.”¹⁶³ The acquisition of monopoly power by merger is universally condemned because of a single firm’s ability to wield anticompetitive economic power that ultimately will reduce consumer welfare: by pricing profitably above marginal cost and collecting monopoly profits while restraining output and excluding competitors.¹⁶⁴

1. In Areas Without Any Cable Service This Is A Merger To Monopoly

In the numerous local markets where there is no cable service, the merger will give EchoStar monopoly power. EchoStar attempts to downplay the significance of the local monopolies that will be created by the merger. Its application states that only 3.4 percent of homes are not passed by cable, relying on the 96.5 percent passed-by-cable rate cited in the Commission’s Seventh Annual Competition Report. In its Eighth Annual Competition Report issued on January 14, 2002, the Commission cites a 97.1 percent figure, based on data from Paul Kagan Associates as of June 2001.¹⁶⁵ While the correct figure of homes passed by cable is in dispute, the 97 percent figure is clearly incorrect and EchoStar’s arguments based on it are therefore invalid.

¹⁶³ *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); see *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.20 (1985).

¹⁶⁴ See Thomas G. Krattenmaker et. al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 242-49 (1987) (discussing compromise to public welfare that monopoly power enables).

¹⁶⁵ Eighth Annual Report ¶ 17, at 11.

The Commission has acknowledged the repeated criticism of the Kagan figure by the NRTC, which suggests that the number of homes is as low as 81 percent.¹⁶⁶ The NRTC points to an April 2000 joint report by agencies of the Departments of Commerce and Agriculture, which estimated that the percentage of homes passed by cable may be as low as 81 percent, depending on the method of calculation.¹⁶⁷ That report notes how the cable industry's statistics may inaccurately rely on housing units passed, instead of households or TV households passed, explaining, for instance, that the Warren Communications report relied on by the NCTA listed more homes passed by cable in Washington, D.C. (258,832) than the number of the households the U.S. Census Bureau estimated existed (225,000).¹⁶⁸

Moreover, in October 2001, The New York Times reported a cable passage rate of approximately 78 percent, with 25 million homes with no access to cable.¹⁶⁹ It also graphically reported that in as many as 22 states, over 30 percent of homes have no cable access. In six states the percentage of homes with no cable access was reported to be between 40 and 50 percent. In a November 20, 2001 letter to United States Attorney General Ashcroft, Missouri Attorney General Nixon wrote that over a third of Missouri's homes (approximately 850,000 of 2.4 million) had no cable access. In this same vein, the Chairman of the United States House of Representatives Judiciary

¹⁶⁶ *Id.* ¶ 17 at 12.

¹⁶⁷ National Telecommunications and Information Administration, United States Department of Commerce and Rural Utilities Service, United States Department of Agriculture, *Advanced Telecommunications in Rural America: The Challenge of Bringing Broadband Service to All Americans*, at 19 n.62 (Apr. 2000).

¹⁶⁸ *Id.*

Committee, Congressman James Sensenbrenner (R-WI), stated during a December 4, 2001 hearing on the EchoStar–DIRECTV merger, that “[b]ecause millions of rural homes do not have cable access, a combined company would create a single [MVPD] in these areas.”¹⁷⁰

Critically, the DBS firms themselves acknowledge that a large share of consumers have no access to cable. In August 2001 comments to the Commission, DIRECTV stated that its own consumer surveys show that 29 percent of its subscribers (which would mean approximately 3.1 million out of 10.7 million as of December 31, 2001) live in areas not passed by cable.¹⁷¹ The figure is likely even higher for EchoStar because that company’s subscriber base probably skews more toward rural consumers than that of DIRECTV. Thus, the 2000 Yankee Group DBS subscriber study indicating that 38 percent of DBS households have no cable access would be consistent with DIRECTV’s candid self-report.¹⁷² Applying the Yankee Group’s percentage to the latest subscriber figures reported by EchoStar (6.4 million) and DIRECTV (10.7 million) would leave nearly 6.5 million (or 5 million if one uses DIRECTV’s 29 percent figure) *current* DBS subscribers without a competing MVPD provider

¹⁶⁹ See *Look, Up in the Sky! Big Bets on a Big Deal*, N.Y. TIMES, Oct. 30, 2001, at C-1 (only 90.9 million homes passed by cable, while 115.9 million homes have access to DBS programming).

¹⁷⁰ *House Comm. on the Judiciary Oversight Hearing on Competition in the Direct Broadcast Service Market*, 107th Cong. (Dec. 4, 2001) (statement of F. James Sensenbrenner, Jr., Chairman) available at <http://www.house.gov/judiciary/sensenbrenner_120401.htm>.

¹⁷¹ See Comments of DIRECTV, Inc., In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 01-129, at 13 (filed Aug. 3, 2001) (only “71% of DIRECTV customers live in areas able to receive television service.”).

¹⁷² See *DBS Subscriber Study*, at 4.

after the merger, without even considering the substantially larger number of consumers living in non-cabled areas who do not yet subscribe to DBS.¹⁷³

Mr. Ergen himself concedes the merger's anticompetitive effect in areas served only by DBS: "If we are not in the [MVPD] market, *if we're in the very narrow satellite market*, and that's the only market we compete in, *then this merger should not be approved.*"¹⁷⁴ It is clear that this merger must not be approved for the Commission to avoid giving the merged firm the ability, as discussed below, to price discriminate against millions of MVPD consumers, particularly in rural areas.

2. The Merger Also Will Result In A Monopoly In Areas With Antiquated Cable Systems

The merger also will create a monopoly MVPD provider for millions of consumers in areas that are currently served by antiquated, one-way analog cable systems. Because of their limited channel capacity, these systems presently are at best an imperfect substitute for DBS. In the long run, most of these systems cannot justify the investment to compete with DBS by upgrading to high-bandwidth digital cable, and face ultimate extinction.

According to an October 2001 report by CS First Boston on DBS service in rural America, "approximately 8,270 cable systems serving roughly 8.2 million subscribers, located primarily in rural territories, could become extinct over the next five to eight years, owing to a steadily deteriorating

¹⁷³ C-band is an alternative source of satellite MVPD services for rural areas, but it is a dying service. C-band subscribership has fallen from a historic peak of 2.3 million in 1995, to less than 1 million in 2001, losing an average of 1,000 customers per day from 2000 to 2001. See Eighth Annual Report, ¶ 67 at 34; SkyReport History of DTH, <http://www.skyreport.com/dth_his.htm>.

¹⁷⁴ *Ergen* at 11 (emphasis added).

competitive position versus DBS.”¹⁷⁵ In support, the report noted that Classic Communications and Galaxy Telecom, two rural cable providers, were failing despite a 54% penetration rate.¹⁷⁶ As a Salomon Smith Barney report explained in December 2001, the bankruptcy filings “would appear to illustrate the bleak plight of many rural cable systems and may make it somewhat more obvious that the number of areas where DBS is, or will be, the only multichannel option is expanding, particularly in rural areas.”¹⁷⁷ The CS First Boston report explained that: “[l]ow household density and small system sizes create business model inefficiencies that will likely prevent most small cable operators, concentrated primarily in [small] counties (i.e., rural America), from providing digital cable and cable modem services. As a result, rural cable should steadily lose subscribers to DBS, particularly as this service evolves to include local broadcasting....”¹⁷⁸

3. The Merger Will Eliminate Full Competition In Other Areas With No Local-To-Local DBS Service

The merger will eliminate competition in those local markets where DBS is a complement, not a substitute, to cable, because EchoStar will not offer local-to-local service. In such areas many

¹⁷⁵ Credit Suisse First Boston Equity Research, *Natural Selection: DBS Should Thrive as the Fittest to Serve Rural America*, at 3 (Oct. 12, 2001).

¹⁷⁶ *Id.* at 4. Classic Communications recently asked the U.S. Bankruptcy Court in the District of Delaware to issue a restraining order to prevent EchoStar from targeting and contacting Classic subscribers to induce them to subscribe to EchoStar’s service. In particular, Classic has alleged that EchoStar has made “false or intentionally misleading statements” to subscribers about Classic’s ability to continue to provide service. SkyReport, *Classic Cable Ready To Sue DISH*, (Jan. 15, 2002) at <<http://www.skyreport.com/skyreport/jan2002/011502.htm#add>>

¹⁷⁷ SkyReport, “Rural MSO Money Woes a Challenge for Merger?” (Dec. 4, 2001) at <<http://www.skyreport.com/skyreport/dec2001/120401.htm>> (quoting Salomon Smith Barney satellite analyst Armand Musey).

¹⁷⁸ *See* Credit Suisse First Boston Equity Research, at 4.

consumers subscribe to DBS because of the attractive characteristics described above that differentiate it from cable, but retain cable service for local channels. In these local markets cable and DBS are complements, not substitutes, and hence do not constrain one another: “it is the absence of substitutes, not the presence of complements, that confers the possibility of market power on producers of a product or service.”¹⁷⁹

EchoStar itself endorses the view that cable and DBS are complements. In its litigation against DIRECTV, EchoStar advanced a complement theory to support its argument for a relevant DBS market. EchoStar stated that “[c]able television is an imperfect and comparatively weak substitute for DBS,” as reflected in the fact that “[s]ignificant numbers of consumers have subscribed to both DBS and/or High Power service and cable service.”¹⁸⁰ Indeed, according to a recent satellite industry-sponsored study, the number of consumers subscribing to both services remains significant: “Twenty Percent of All DBS Subscribers with Cable Available Subscribe to Cable.”¹⁸¹ Moreover, the study concluded that “18% of new DBS households with cable available subscribe to cable” and “[a]mong

¹⁷⁹ Jonathan B. Baker, *The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry*, 51 L. & CONTEMP. PROBS. 93, 137 (1988); see William F. Baxter & Daniel P. Kessler, *Toward a Consistent Theory of the Welfare Analysis of Agreements*, 47 STAN. L. REV. 615, 619 n.25 (1995) (“Two goods are complements if the elasticity of demand for one good with respect to the price of the other is negative [and] two goods are substitutes if the elasticity of demand for one with respect to the price of the other is positive.”).

¹⁸⁰ Ricketts Decl., ¶ 14, at 4-5; see also *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 821 (D.C. Cir. 1997) (USSB DIRECTV programming complementary, not competitive).

¹⁸¹ DBS Subscriber Study 2000 at 6.

DBS households who have cable available and reside in areas where local station[s] are made available via DBS, 16% still subscribe to cable.”¹⁸²

After the merger, by its own account, EchoStar will not carry local television station signals in 110 DMAs, leaving at least 14 percent of households nationally where cable and DBS will operate as complements, not competitive substitutes.

D. This Will Be A Merger To Duopoly In Most Other Local Markets

Even assuming that DBS and cable are close substitutes in certain local MVPD markets, this is at best a merger to duopoly. As the Commission recently noted: “Among the several wireless technologies used to provide video programming service, DBS is the only wireless technology currently available to a majority of subscribers nationwide. Thus, homes are generally passed by only one wireline cable operator and the two major DBS providers, DIRECTV and EchoStar.”¹⁸³

Concentration levels in a great many of these local markets will be astronomical after the merger. The Merger Guidelines call any market where the Herfindahl-Hiaschman Index (“HHI”) is above 1800 “highly concentrated.” A merger that raises the HHI by 50 points or more in such a market potentially raises “significant competitive concerns” and mergers that raise the HHI by more than 100 points are presumed to “create or enhance market power or facilitate its exercise.”¹⁸⁴

¹⁸² *Id.* at 6-7.

¹⁸³ See Eighth Annual Report ¶ 119, at 55. NRTC and Pegasus Communications, as distributors of DIRECTV’s service to millions of rural consumers, will be customers – not competitors – of EchoStar after the merger and will not represent independent competitive forces in the marketplace.

¹⁸⁴ Merger Guidelines, ¶ 1.51.

In the 20 DMAs where the DBS carriers have the greatest market share, the post-merger HHI will be above 5,000 in each DMA and the HHI increase will be from 395 to 647, as the following table reproduced from Dr. Sidak's Declaration shows:¹⁸⁵

PRE-MERGER AND POST-MERGER HHIS BY DMA, RANKED BY SIZE OF INCREASE

Name	Cable Share	DBS Share	DTV Share	Echo Star Share	Pre-Merger HHI	Post-Merger HHI	Increase in HHI
Springfield, MO	62.9%	37.1%	23.1%	14.0%	4,686	5,333	647
Bowling Green, KY	63.2%	36.8%	22.9%	13.9%	4,716	5,351	635
Hattiesburg-Laurel, MS	64.3%	35.7%	22.2%	13.5%	4,813	5,411	598
Meridian, MS	65.5%	34.5%	21.5%	13.0%	4,917	5,478	561
Presque Isle, ME	65.7%	34.3%	21.3%	12.9%	4,942	5,494	552
Great Falls, MT	65.7%	34.3%	21.3%	12.9%	4,944	5,496	552
Bangor, ME	66.9%	33.1%	20.6%	12.5%	5,053	5,569	516
Missoula, MT	67.1%	32.9%	20.5%	12.4%	5,072	5,582	510
Duluth-Superior, MN	67.8%	32.2%	20.0%	12.2%	5,148	5,635	487
Columbus-Tupelo, MS	68.0%	32.0%	19.9%	12.1%	5,171	5,651	480
Paducah, KY-Cape Girardeau, MO-							
Harrisburg-Mt Vernon, IL	68.7%	31.3%	19.5%	11.8%	5,243	5,702	459
Terre Haute, IN	68.9%	31.1%	19.4%	11.8%	5,257	5,712	455
Burlington, VT-Plattsburgh, NY	69.0%	31.0%	19.3%	11.7%	5,267	5,720	453
Traverse City-Cadillac, MI	69.0%	31.0%	19.3%	11.7%	5,273	5,724	451
Wausau-Rhineland, WI	69.3%	30.7%	19.1%	11.6%	5,306	5,748	442
Columbia-Jefferson City, MO	69.4%	30.6%	19.1%	11.6%	5,310	5,751	441
Butte-Bozeman, MT	69.7%	30.3%	18.9%	11.5%	5,341	5,774	433
Sherman, TX-Ada, OK	70.0%	30.0%	18.6%	11.3%	5,381	5,803	422
Billings, MT	70.4%	29.6%	18.4%	11.2%	5,424	5,835	411
Boise, ID	71.0%	29.0%	18.1%	11.0%	5,486	5,882	395

Source: Nielsen Media Research, Nov. 2001.

Note: DIRECTV and EchoStar market shares are approximated by using nationwide market shares.

After the merger, in these and many other highly concentrated local MVPD markets the number of competitors will be reduced from three to two, with the significant anticompetitive effects discussed below.

¹⁸⁵ Sidak Decl. at ¶¶ 24-25 and Table 2.

Unilateral Anticompetitive Effects In Duopoly Markets: A horizontal merger may “create a single firm with substantial market power, enabling that firm unilaterally to raise prices, especially if it eliminates the acquiring firm’s close[s]t rival.”¹⁸⁶ Indeed, the Merger Guidelines warn that “merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output.”¹⁸⁷ “Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.”¹⁸⁸ Competition, however, protects “all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost.”¹⁸⁹

As the Merger Guidelines explain:

Substantial unilateral price elevation in markets for differentiated products requires that there be a significant share of sales in the market accounted for by consumers who regard the products of the merging firms as their first and second choices, and that repositioning of the non-parties’ product lines to replace the localized competition lost through the merger be unlikely. The price rise will be greater the closer substitutes are the products of the merging firms, i.e., the more the buyers of one product consider the other product to be their next choice.¹⁹⁰

EchoStar and DIRECTV, while offering differentiated products, are the closest substitutes for one another as the only significant satellite providers of multichannel video programming. Further, they offer MVPD services that are significantly differentiated from cable systems in terms of price, channels

¹⁸⁶ *ALD*, at 318.

¹⁸⁷ *Merger Guidelines*, § 2.2.

¹⁸⁸ *Id.* § 0.1.

¹⁸⁹ *Nat’l Soc’y of Prof. Eng’rs v. United States*, 435 U.S. 679, 695 (1978). Indeed, antitrust law prohibits anticompetitive reductions in quality because they are equivalent to an increase in price – consumers pay the same (or greater) price for less. *See Community Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1153 n.8 (W.D. Ark. 1995), *aff’d sub nom. Community Publishers, Inc. v. DR Partners*. 139 F.3d 1180 (8th Cir. 1998).

¹⁹⁰ *Merger Guidelines*, § 2.21.

of programming, picture and sound, pay-per-view and premium sports options, and customer service, as discussed above. This is especially true in areas with weak cable systems offering limited, analog programming and in areas where the DBS firms offer no local-to-local service; in these markets, cable is a complement to DBS service.

Coordinated Effects By Duopolists: Coordinated anticompetitive effects are also a serious concern. It is well established that “[s]ignificant market concentration makes it ‘easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.’”¹⁹¹ The threat is that “firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.”¹⁹² As market concentration increases, the “greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge.”¹⁹³ Based on these economic principles, no market structure is more conducive to coordinated interaction than a duopoly. A duopoly provides “a fertile medium for interdependent anticompetitive conduct” and “the relative lack of competitors eases coordination of

¹⁹¹ *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) (citations omitted); see *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986) (merger analysis “rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.”).

¹⁹² *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

¹⁹³ *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964).

actions, explicitly or implicitly, among the remaining few to approximate the performance of a monopolist.”¹⁹⁴ Such coordination:

is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws. It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.¹⁹⁵

The anticompetitive effects in the post-merger EchoStar-cable duopoly markets will be exacerbated for two reasons. *First*, as indicated above, there will be no full-CONUS slots from which another DBS competitor could compete against the merged entity. As Dr. Sidak explains, the orbital slot constraint is an absolute barrier to entry.¹⁹⁶ In addition, there are substantial barriers to entry into the MVPD markets. As Dr. Sidak explains, it “is unlikely, because of the existence of barriers to entry in the MVPD market, that new firms will enter the MVPD market to challenge the services of incumbent cable television and DBS service providers in the near future.”¹⁹⁷

Second, until now, even though MVPD markets were oligopolistic in nature, with most local markets having only three participants, EchoStar played the role of a maverick.¹⁹⁸ EchoStar’s incentive to do so was great because its costs were basically sunk and fixed and it had a tremendous ability to expand capacity at a low cost. In addition, as the last entrant, EchoStar had only a small customer base

¹⁹⁴ *FTC v. PPG Indus.*, 628 F. Supp. 881, 885 & n.9 (D.D.C.), *aff’d in relevant part*, 798 F.2d 1500 (D.C. Cir. 1986).

¹⁹⁵ 4 PHILLIP E. AREEDA, ET AL., *ANTITRUST LAW* ¶ 901b2 at 9 (rev. ed. 1998); *see University Health*, 938 F.2d at 1219 (four firms “easily could collude to [raise prices or reduce output] without committing detectable violations of . . . the Sherman Act”).

¹⁹⁶ Sidak Decl. ¶ 33.

¹⁹⁷ *Id.* ¶ 30.

¹⁹⁸ *Merger Guidelines*, § 2.12.